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THE

LAW OF NATIONS

CONSIDERED AS

INDEPENDENT POLITICAL COMMUNITIES.

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LAW OF NATIONS

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INDEPENDENT POLITICAL COMMUNITIES.

ON THE RIGHTS AND DUTIES OF NATIONS
IN TIME OF WAR.

BY

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SECOND EDITION REVISED,

WITH AN INTRODUCTORY JURIDICAL REVIEW OF THE RESULTS OF RECENT WARS, AND AN APPENDIX OF TREATIES AND OTHER DOCUMENTS.

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PREFACE

TO THE FIRST EDITION.

THE Author has endeavoured, in treating of the Rights and Duties of Nations in time of War, to observe, as far as the subject would permit, the same method of investigation, which he has found eminently convenient in discussing the Rights and Duties of Nations in time of Peace. He has accordingly sought to ascertain under each head the leading Principles, which lie at the foundation of the Law, by an historical analysis of the Practice which has prevailed amongst Nations at various times, as the earlier Practice will be found in most instances to disclose some general Principle, based upon an absolute view of Belligerent Right, the application of which has become modified in modern Practice, either under the civilising influence of Commerce, or in deference to some conflicting Right of Neutrals.

If the process of this Modification be carefully traced, Commerce will be found to have exerted its civilising influence chiefly through the form

of express Treaty-Engagements, concluded in time of Peace upon a deliberate view of the mutual interest of the contracting Parties; whilst the adjustment of Belligerent Right with the conflicting Right of Neutrals has been for the most part the result of a tacit agreement between the Neutral and the Belligerent, the acquiescence of the Neutral in each case being purchased by a concession from the Belligerent of no little importance to the general Peace of the World.

History, in its relation to the Rights of War, may truly be said to be Philosophy teaching by Example; and the wider and more complete the historical survey will have been, the more irresistible will be the conclusion, that the employment of Force on the part of Nations in the prosecution of Right against other Nations has become subject to Rules, which are in accordance with Reason, and have the Common Weal for their object.

The end of War, regarded as a High Trial of Right between Nations, is either to redress past injury, or to prevent future injury, and the mode, whereby Belligerent Force operates to accomplish one or other of these objects, is by taking security (*pignoratio*) from the wrong-doer; in other words, by the seizure of his property. Hence War implies necessarily a direct operation of Force against Property, whilst it entails only accidentally the employment of Force against the Persons of individuals, by reason of the resistance which they

may offer to the process of taking security from the wrong-doer. A Declaration of War implies indeed, that a Nation intends to overcome by Force any resistance, which may be offered to it in exacting satisfaction; but whilst the seizure of the Property of the Enemy is a necessary means for procuring satisfaction, which no Belligerent can be expected to renounce, the measures to be adopted for overcoming resistance are susceptible of infinite modifications; and it is in respect of such modifications that the Civilisation of the nineteenth century is far in advance of that of the seventeenth and eighteenth centuries, and may be expected in its turn to be left behind by the Civilisation of future ages.

With regard to the Rights, which a state of War gives rise to between the Subjects of two Belligerent Powers, the greater mildness of modern manners, coupled with the instinct of Human Nature, which leads us to pity in others what we fear for ourselves, has insensibly operated to restrain the extreme exercise of those Rights, and wherever the employment of Belligerent Force in an extreme manner has fallen into desuetude, the revival of its exercise would justly be regarded as an innovation upon the modern Practice, and, as such, a breach of the Customary Law of Nations.

On the other hand, if we regard the Duties, which a state of War gives rise to between a Belligerent Power and the Subjects of a Neutral

Power, a tacit agreement would seem to have been entered into between Neutral and Belligerent Powers, that on the one hand the Neutral State shall not be implicated in the misconduct of the individual, and on the other hand the offender shall be subject to the exercise of Belligerent Right. Forfeiture of Property is under such circumstances the penalty, which the Belligerent State inflicts upon the Subjects of a Neutral Power for every departure from Neutrality, whilst the Neutral State abstains from all interference between the captors and the captured, on the understanding that it shall not be responsible for the misconduct of its Subjects, nor be involved by their acts in War against its will. It is the duty of every Neutral Power, as such, to observe Impartiality, and consequently, if its Subjects voluntarily array themselves under the banner of one of the Belligerent parties, to make no complaint, if they are treated by the other as Enemies. But it will always be a question of a most delicate nature with regard to its own citizens for a Neutral State to renounce the obligation of protecting them from the operation of Belligerent Force, unless it shall be satisfied of the justice and legality of the rules of conduct, which the Belligerent Power prescribes to its Commissioned Agents. Hence, whilst the Neutral Nation allows to a Belligerent Nation the unobstructed exercise of the Rights of War, its own dignity and security require that a Court of the Law of Nations should sit in judgment on each case, and pronounce whether its Subjects have

been guilty of a breach of Neutrality, or the Commissioned Agent of the Belligerent Power has exceeded his authority. It was in this direction, that the first step was made to vindicate the equality and independence of Neutral Powers by Treaty-Stipulations, that all questions of Prize of War in regard to Neutral property should be submitted by the Belligerent captor to a judicial enquiry, so that the Neutral Subject might be heard in his defence, and not be deprived of his property, until his complicity with the Enemy should have been established. No wrong will have been inflicted upon the Subject of a Neutral Power, if he should be punished by the strong arm of a Belligerent Power for a breach of Neutrality, as soon as his bad Faith has been established; but an intolerable wrong may be inflicted upon a Neutral merchant by a Belligerent captor, if his property should have been seized and detained in bad faith, under the pretext of the Right of every Belligerent to submit the conduct of the Subjects of a Neutral Power to the ordeal of a judicial enquiry. The prompt action of Prize Tribunals is intended to mitigate this evil, and it is therefore incumbent on the good Faith of every Belligerent Power to prevent any unreasonable delay in the action of those Tribunals.

A great concession has been made to the convenience of Neutral Commerce by the Declaration issued by the Powers assembled in Congress at Paris in 1856, under which they have renounced in regard to one another the exercise of Belligerent

Right against Enemy's goods laden in vessels under the mercantile flag of a Neutral State. The Neutral Merchant has ever been a great instrument under Providence in mitigating the extreme exercise of Belligerent Right, and the victories of Commerce may be traced through a long series of Treaties and Declarations, which serve to mark the epochs, when the more rigorous usages of War have been formally renounced by the leading Maritime Powers, after whose example such usages have subsequently been allowed by all civilised Nations to fall into desuetude.

The Right of a Belligerent to debar his Enemy from all supplies by blockading his coasts, is a right in the exercise of which all Nations, which profess Neutrality, must be prepared to acquiesce; but the interests of Neutral Commerce, under the more enlightened views of the present age as to the reciprocal benefits which result from Commerce, may demand a more candid consideration at the hands of Belligerent Powers, than they have heretofore received.

That a Belligerent Power should cut off the supplies, which a Neutral merchant is carrying from a Neutral port to the Enemy's country, is eminently reasonable; but that a Belligerent Power should cut off the supplies, which a Neutral merchant is carrying from the Enemy's ports to a Neutral country, may not accord so entirely with Reason, nor will it always rest upon the same foundations of Necessity. Great Britain and

France established a blockade on 1 June 1854, against the vessels of all Nations entering the river Danube, whilst Neutral vessels were allowed to come out with cargoes destined to Neutral ports. Accordingly Greek and Ionian vessels continued to load cargoes in the Danubian ports, and the Neutral Nations of Europe were not debarred during the continuance of hostilities from all access to one of their accustomed granaries. It may well merit the calm consideration of Statesmen, whether the conduct of the Allied Powers on this occasion, in the exercise of the Right of Blockade, has not furnished an example of moderation, which will be deserving of imitation under circumstances of an analogous nature, where Neutral Nations depend upon access to the country of a Belligerent for their normal supplies of an article of primary necessity.

Another question suggests itself in reference to the exercise of the Right of Blockade arising out of the Declaration of the Congress of Paris, that "Blockades in order to be binding ought to be effective;" in other words, "ought to be maintained by a force sufficient to prevent really all access to the coast of the Enemy." No explanation is afforded in the Protocols of the Congress on the subject of the forms, which are to attest the reality of an effective Blockade.

On the one hand, it seems reasonable to suppose, that the Congress had in view some other criterion of the reality of an effective Blockade than the actual capture of an offending vessel;

on the other hand, where the presence of a blockading squadron off the mouth of a port is notorious, a Neutral merchant can hardly claim in good Faith, that his vessel should receive an actual warning from one of the Belligerent cruisers, in order that the reality should be established of all access to the Enemy's coast being interdicted. It may however deserve consideration, whether the good Faith of every Belligerent Power, which is a party to the Declaration of Paris, should not prompt it to grant a period of Grace, after a Blockade has been *de facto* established, during which the effectiveness of the Blockade shall be attested to Neutral merchants by an actual warning given by the blockading squadron to all vessels seeking access to a blockaded port, and during which period no Neutral vessel shall be confiscated, unless she attempts to run past the blockading squadron after such warning.

With regard to Contraband of War, no merchant can with reason complain of being treated by a Belligerent Power as an adherent of the Enemy, if he carries to the Enemy supplies of war; but there are many articles of Equivocal Use, and there will be from time to time articles of Novel Character, respecting which it will not be always clear to the merchant, that it is inconsistent with Neutrality to transport them to the Enemy's country. Naval steam-engines, for instance, are articles of modern invention, and were for some time considered to be only serviceable for vessels of Com-

merce, whereas they are now likely to supersede all other motive power for ships of War. It may be a question in the present day, whether it would not be in accordance with that large Equity, which the great and rapid development of International Commerce demands at the hands of Belligerents, in order that good Faith on all sides should be maintained, that every Belligerent Power should at the outset of War notify to all Neutral Powers what articles of Equivocal Use and Novel Character it intends to capture and confiscate, if they should be intercepted by its cruisers in the course of transport to the Enemy's country. That Belligerent Powers are entitled to notify such articles to Neutral Powers, and to confiscate them after such Notification, seems not to have been doubted in the seventeenth century. Sir Leoline Jenkins, after stating his opinion to King Charles II, that nothing ought to be adjudged Contraband by the Law of Nations but what is subservient to the uses of War, goes on to say, "except in the case of Besieged Places, or of a General Notification made by Spain to all the world, that they will condemn all the pitch and tar which they meet with." (29 Aug. 1674.) But whilst a Belligerent Power, to whose detriment a prohibited trade is carried on, may with Reason seize and confiscate articles of a certain character, although they may belong to the Subjects of a Neutral Power, if they are in the course of transport to the Enemy's country, the Law of Nations does not impose upon a Neutral Power, as such, any obligation to pre-

vent its Subjects from embarking their property in trade with either of two Belligerent Powers.

The transport of merchandise to the ports of a Belligerent State is *per se* a perfectly lawful act on the part of a Neutral merchant; and it is only by reason of the accidental uses, to which certain articles of merchandise may be applied in consequence of War existing between two States, that the Right to intercept such merchandise in the course of transport on the High Seas to the ports of a Belligerent Power, and to confiscate it to its own uses, accrues to the adverse Belligerent. The right of the Neutral to transport and of the adverse Belligerent to seize, are conflicting Rights, and neither party can charge the other with a criminal act. Upon this view of the Common Law, which is sanctioned by the highest Authorities, it would be under an erroneous conception of the juridical relations which exist between Belligerent States and Neutral States, that a Belligerent Power, in the absence of special Treaty-Engagements with a Neutral Power, should hold itself entitled to complain to the latter of its not exercising its authority to restrain the trade of its Subjects with the adverse Belligerent. The Belligerent, to use the language of an eminent Judge of the Supreme Court of the United States, must content himself with cutting up the Neutral Commerce, and ought to make no complaint to the Neutral Power, not even where the individual merchant rescues his vessel after capture, and escapes into his own or a friendly port.

The historical survey, which the Author has endeavoured to complete, as occasion has permitted, in the course of the following pages, establishes the material fact, that the main Principles of Prize Law were considered nearly in the same light four hundred years ago as in the present day; and that the Rules, in which those Principles were then embodied, were framed with particular attention, and with special regard to the Practice and Usage which had anciently prevailed in such matters. We have thus the experience of ages attesting the existence of a Law, to which Belligerent Nations pay respect even in the moment of victory, and the beneficial operation of which Law has been promoted by equitable concessions, which Belligerents have wisely made from time to time, in the administration of it. The Rights of War can never be absolutely renounced by Nations, for they are Natural Rights, to which every Nation may be compelled, under circumstances of an extreme kind, to have recourse; but the exercise of those Rights can at all times be moderated, and it is by moderation in the exercise of them, that those Nations which claim to be the leaders of the civilised World in the arts of Peace, are bound to set an example to other Nations in time of War.

* * * *

Oxford, *June* 18, 1863.

PREFACE

TO THE SECOND EDITION.

THE present Edition contains very little new matter, as far as the body of the work is concerned. Some corrections and additions have been made, where it was necessary to adjust the text to the altered political circumstances of either hemisphere, or to keep it on a level with the advancement of learning on other subjects, but no departure has been made from the principles, upon which the author has stated in the first edition, that the Rights and Duties of Nations in time of War have their foundation. The author, however, has considered that it would be for the advantage of the reader, that the results of the wars of the last ten years should be succinctly reviewed in a special chapter, which should form an Introduction to the work, and that the modern theories on the subject of War, which are advocated by eminent continental Publicists, should be briefly discussed in their bearings on the true interest of a Belligerent, which is to enforce upon the enemy the necessity of doing justice, whilst inflicting upon him the least amount of irreparable harm.

The loss of life and the loss of territory are of the latter character, but the destruction of property may be repaired. War however presupposes always a certain sacrifice of life, but the civilisation of the present century is steadily striving to mitigate that sacrifice, and the conduct of the wars of the last ten years has shown, that it has been in many respects successful. On the other hand, as regards territory, the annexation of territory is not necessary to effectuate the lawful purposes of war, when its object is to obtain redress for wrong, and where States are conterminous, such annexations are fraught with the seeds of future wars. There may be grounds occasionally on which such annexations are justifiable, as safeguards against future wrong, but the justification of the great annexations of territory, which have been the results of the wars of the last ten years, has been in many cases sought for in the voices of the populations of the annexed territories. This is a very remarkable feature in the modern conduct of war, more especially as the modern theory, that war should be regarded as a state of relations between Governments only, and not between Nations, is calculated to detach the population of an invaded country from the cause of its Government, and to facilitate its acquisition at the end of the war by the voice of the population. The author has noted in the Introduction the complicated stages of diplomacy mixed with the popular vote, through which a way was found

to the unification of the Italian Kingdom, and to the formation of the new Confederation of Germany. He has also thought it useful to append to the work the Treaties and International Acts of the last ten years, which have a special bearing on the Rights and Duties of Nations in time of War. It will be seen from their perusal, that the European Governments are steadily acting in concert with a view to mitigate the practice of warfare, and are placing on record their conviction, that many forms of inflicting harm on life and property may be properly abandoned by Belligerents, either as not warranted by the necessities of modern warfare, or as not tending directly to effectuate the purposes of lawful war in any degree commensurate with the sufferings which they are calculated to cause. It is the conviction of the author, that the juridical principles upon which the present practice of warfare rests are sound principles, and that their maintenance is necessary for the safety of Nations, and that what true civilisation requires is not their abandonment, but their application with a more discerning judgment, and with greater equity.

TEMPLE, LONDON,
Oct. 4, 1875.

INTRODUCTION

TO THE SECOND EDITION.

THE first edition of this work was published in 1863, at a time when a Civil War was raging between the States of the North American Union, which gave rise to some intricate questions of Public Law between the United States of America and the Maritime Powers of Europe. Those questions have been adjusted by amicable negotiation since the termination of the War. The result of that War has been to maintain the Sovereignty of the Union unimpaired throughout all the territory over which the authority of the Federal Government extended before the War. Since that time the peace of the Continent of Europe has been disturbed by four Wars, and each War has been attended with a dislocation of the Sovereign Power and a political redistribution of territory. In 1864 the Allied Armies of Austria and of Prussia overran the Duchies of Sleswig and of Holstein, whilst Denmark blockaded the Baltic ports of Prussia. The result of that unequal contest was that the King of Denmark had to renounce all his Sovereign rights over the Duchy of Lauenburg and over the Duchies of Sleswig and of Holstein in favour of

the King of Prussia and of the Emperor of Austria. In 1866 Italy declared War against Austria, and Prussia likewise made War upon Austria, the result of which was that Austria renounced her Sovereignty over the Lombardo-Venetian Kingdom and withdrew with her German provinces from the Germanic Confederation. In 1870 the armies of the newly established Kingdom of Italy occupied the Papal States, and the Roman Provinces, notwithstanding the Protest of the Papal Government, were annexed to the Italian Monarchy by a Decree of the King of Italy (2 Oct. 1870). In the same year France declared War against Prussia, and the result of that War was that France renounced under the Treaty of Frankfort (10 May, 1871) all her rights over a large part of Lorraine and over the whole of Alsace in favour of the German Empire. The last ten years have thus proved to be a very eventful period in the history of European Wars; and although those Wars have been attended with their usual desolation, the practice of warfare has been somewhat ameliorated, and the period has been marked by three International Acts, to which all the European States have acceded, the object of which has been to conciliate in some degree the necessities of War with the laws of humanity, namely, the Conventions of Geneva of 1864 and of 1868 respectively, and the Declaration of St. Petersburg of 1868.

It was an expressed wish of the Powers, who took part in the Congress of Paris of 1856, that

States, between which any serious misunderstanding might arise, should have recourse, as far as circumstances might allow, to the mediation of a friendly Power before appealing to arms. This wish was partially responded to in the War between Denmark on the one hand and Austria and Prussia on the other in 1864, as the alleged grievance, out of which that War ostensibly arose, was capable of being adjusted by amicable mediation. That grievance was set forth in a note presented on 16 January, 1864, on the part of Austria and of Prussia jointly summoning Denmark to abrogate the common constitution for Denmark and for Sleswig, which had been sanctioned by the King of Denmark on 18 November, 1863, as being inconsistent with the Treaty-engagements contracted by Denmark with the two Powers in 1852. An Austro-Prussian army having entered the Duchy of Sleswig for the purpose of compelling the Danes to evacuate the Duchy, and having overrun a considerable part of Jutland, an attempt was made by France, Great Britain, Russia and Sweden, to bring about an amicable arrangement between the contending parties, but the Conferences of London, which were commenced with that object on 20 April, 1864, terminated on 22 June, 1864, without any satisfactory result, and hostilities, which had been suspended during the mediation, were resumed. The final result of this War was that by the Treaty of Vienna (30 October, 1864) the King of Denmark renounced all his rights over the Duchies of Sleswig and of Holstein, and over the

Duchy of Lauenburg, in favour of the King of Prussia and of the Emperor of Austria, and engaged himself to recognise whatever arrangements the two Powers might make respecting those Duchies. By the Treaty of Gastein (14 August, 1865) Prussia and Austria agreed to terminate their joint dominion over the ceded territories, Prussia undertaking to administer the government of the Duchy of Sleswig and Austria that of the Duchy of Holstein, whilst Austria ceded all her right over the Duchy of Lauenburg to Prussia. By the subsequent Treaty of Prague (23 August, 1866) Austria renounced all her acquired rights over the Duchies of Holstein and of Sleswig in favour of Prussia, and the Duchies were incorporated with the Prussian Monarchy by Letters Patent of the King of Prussia on 12 January, 1867.

The next following War, which broke out between Austria and Italy in 1866 led to the reunion of the Lombardo-Venetian Kingdom to the States of the King of Italy. By a Treaty signed at Vienna on 24 August, 1866, the Emperor of Austria ceded the Lombardo-Venetian Kingdom to the Emperor of the French, who agreed to accept it, but the French Commissioners were not to be put into possession of it, until Peace had been signed between Austria and Italy. Peace was subsequently signed at Vienna on 3 October, 1866, and the Emperor of Austria formally consented by the third Article of the Treaty of Peace, that the Lombardo-Venetian Kingdom should be reunited

to the Kingdom of Italy. Thereupon the French Commissioners were formally put into possession of the Lombardo-Venetian Kingdom, and on 19 October, 1866, General Le Bœuf, on the part of the Emperor of the French, handed it over to the Commissioners of the King of Italy, in order that the inhabitants of the Kingdom might declare by universal suffrage their wishes on the subject of their annexation to the Kingdom of Italy. The inhabitants of the Italian provinces were accordingly convoked, and declared by their suffrages their desire to be united to the Kingdom of Italy under the Constitutional Monarchy of Victor Emanuel II. and his descendants. The King of Italy thereupon issued a Decree (4 November, 1866) declaring the provinces of Venetia and the province of Mantua to form an integral part of the Kingdom of Italy, and the incorporation of the ceded provinces was thus completed.

On the other hand, the War, which broke out in the summer of 1866 between Austria and Prussia, entailed as one of its consequences the dissolution of the Germanic Confederation, such as it was constituted by the Federal Act of 1815, and by the Final Act of 1820, whilst Austria by the Treaty of Nikolsburg (26 July, 1866) recorded her formal consent to the formation of a new Constitution for Germany to the exclusion of her German provinces from the Confederation. The new Constitution of Germany however was not accomplished at once. A Confederation of North Germany was first formed,

at the head of which was Prussia, whilst Bavaria, Wurtemberg, Baden, and Hesse, south of the River Maine, constituted themselves into a South German Military League. The Northern and Southern States however became united in 1870 by a series of Treaties into one Germanic Confederation, which assumed in 1871 the title of the German Empire, under a Constitution promulgated by the King of Prussia in the name of the Confederation of North Germany, and by the Kings of Bavaria and of Wurtemberg, and by the Grand Dukes of Baden and of Hesse respectively, in their own names (16 April, 1871). The existing Germanic Confederation, which has under this constitution adopted the title of the German Empire, consists of twenty-seven States, namely, Prussia with Lauenburg, Bavaria, Saxony, Wurtemberg, Baden, Hesse, Mecklenburg-Schwerrin, Saxe-Weimar, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss the elder branch, Reuss the younger branch, Schaumburg-Lippe, Lippe, Lubeck, Bremen, and Hamburg. Austria no longer appears in the list of the Federated States, whilst Prussia is the representative of Hanover, Electoral Hesse, Holstein, Nassau, and Frankfort, and has had assigned to her seventeen votes in the Council of the Empire, the other States having forty-one votes amongst them.

Meanwhile certain territorial changes have been

peaceably carried out in the East of Europe in modification of the arrangements concluded under the Treaty of Paris of 1856. By a Convention signed at Paris on 19 August, 1858, between the Seven Powers who were parties to the Treaty of 1856, the Principalities of Moldavia and Walachia were united together under one Hospodar under the title of the United Principalities of Moldavia and Walachia, and certain privileges and immunities were secured to them subject to the Suzerainty of the Sultan and under the collective guaranty of the Co-Signatory Powers. The provisions of this Convention were subsequently modified at a Conference of the Plenipotentiaries of the Seven Powers assembled at Constantinople on 28 June, 1864. A further Conference was held in Paris in 1866, between the Plenipotentiaries of the same Powers on the same subject, in consequence of the Government of Prince Couza, as Hospodar of the United Principalities, having come to an end. Pending the deliberations of the Plenipotentiaries the Roumanian people, by a plebiscite, elected Prince Charles Louis of Hohenzollern-Sigmaringen, under the name of Charles I, to be Hospodar of the United Principalities, notwithstanding a previous declaration on the part of the Conference, that the Roumanian assembly could only elect a native subject of the Ottoman Porte to be Hospodar. The Ottoman Porte accordingly recorded a formal protest in the Protocols of the Conference against the election of Prince Charles, and the guaranteeing Powers refused to recognise the election. Meanwhile Russia

and Turkey proposed, that an armed intervention of the guaranteeing Powers should take place in order to maintain the existing Treaty-arrangements, but both France and England were of opinion that such an intervention would be inopportune, and ultimately the Ottoman Porte waived its objections to the Election, and issued a Firman of Investment to Prince Charles Louis of Hohenzollern-Sigmaringen on 23 October, 1866. It was urged in the course of the Conferences, on the part of Prussia, that the real object of the Treaties was the maintenance of the Suzerainty of the Porte, so far as it involved the principle of the integrity of the Ottoman Empire, and that the organic constitution of the Principalities was a subordinate question, inasmuch as that Constitution had undergone considerable modifications in 1858. Russia and Turkey, on the other hand, maintained that the Treaties of 1856 and of 1858 formed a whole, and that it was not permissible to violate them in one point any more than in another. The observations of the Russian Plenipotentiary on this occasion were destined to point a moral, when a fitting opportunity presented itself, which occurred in 1870, when Prince Gortchacow addressed a Circular Despatch of the date of $\frac{19}{31}$ October, 1870, to the Representatives of Russia at the Courts of the Six Co-Signatory Powers. In this Despatch, which is a remarkable State paper, the Russian Minister for Foreign Affairs brings to the attention of the Russian Diplomatic Agents the fact, that the Treaty of Paris of 1856 has been permitted by the Great

Powers to be infringed with impunity as regards the Principalities of Moldavia and Walachia, and that it has not been faithfully observed by the Ottoman Porte in allowing foreign vessels of War to pass the Straits of the Dardanelles, and even entire fleets to enter the Black Sea, the presence of which was a violation of the neutrality of its waters; and further, that the novel appliances of armour to vessels of War, unknown in 1856, was fraught with danger to the safety of Russia from the great inequality of the Russian and Turkish naval forces. On these grounds, the Despatch goes on to say, the Emperor of Russia cannot admit, that Treaties infringed in several general and essential clauses should continue to be obligatory upon him as regards the direct interests of his Empire, and that the safety of his Empire should repose upon a fiction, which had not resisted the trial of time, and that it should be imperilled by his respect for engagements, which had not been observed in their integrity. The Emperor accordingly declares, that he cannot consider himself to be any longer bound by the obligations of the Treaty of $\frac{18}{30}$ March, 1856, as far as they restrain his rights of sovereignty in the Black Sea, and that he holds himself to be entitled to denounce to the Sultan the special Convention, which limits the number of vessels of War, which the two Powers had reserved to themselves the right of maintaining in the Black Sea. On the other hand, he had no wish to depart from the general arrangements of the Treaty of 1856, as regards

the Eastern question, and was willing to come to an equitable arrangement with the Co-Signatory Powers, which should be better calculated to secure the repose of the East and the European equilibrium.

There is a prevalent impression consequent on the publication of this Circular Despatch, that Russia acted forthwith upon the view expressed in it, and took advantage of the circumstance, that France was engaged in a war with Germany, in order to renounce her engagements to the Great Powers respecting what has been termed in the language of diplomacy the neutralisation of the Black Sea, but which in fact was the naval disarmament of Russia in the Black Sea. Russia, however, has not set so dangerous an example of bad faith. The propositions of the Imperial Cabinet were formally brought under the consideration of the Co-Signatory Powers at a Conference opened in London on 17 January, 1871, in which the first act on the part of the Plenipotentiaries was to sign a Protocol, which was made an annex to the General Protocol of the Conference in these terms:—"The Plenipotentiaries of North Germany, Austria-Hungary, Great Britain, Italy, Prussia, and Turkey, assembled this day in Conference, recognise, that it is an essential principle of the Law of Nations, that no Power can liberate itself from the engagements of a Treaty, nor modify its stipulations, except with the consent of the contracting parties by means of an amicable understanding."

This Protocol was at once signed by the Plenipotentiaries of the six Powers (17 January, 1871). The Plenipotentiary of France was not present at the first Session of the Conference, but he affixed his signature to the Protocol immediately upon his arrival in London.

The ultimate result of this Conference was, that Russia and Turkey having agreed to abrogate the Special Convention concluded between them on $\frac{18}{30}$ March, 1856, to which reference is made in Prince Gortchacow's despatch, the Articles of the General Treaty of 1856 confirming that Convention were abrogated with the consent of all the Signatory Powers, and were replaced by the following article:—"The principle of the closing of the Straits of the Dardanelles and of the Bosphorus, such as it was established by the Separate Convention of March $\frac{18}{30}$ of 1856, is maintained, with power to His Imperial Majesty the Sultan to open the said Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary to secure the stipulations of the Treaty of March $\frac{18}{30}$, 1856."

The Protocol of London of 17 January, 1871, contains an International Recognition, which is of great importance in its application to cases, where diplomatists assembled in Congress have affixed their signatures to a general Treaty, to which are annexed special Treaties concluded in a separate form between certain of the Powers which are parties to

the General Treaty, and which are declared to have the same force and validity as if they formed part of the General Treaty. It has been the practice of Nations to hold, that the non-execution or the violation of a Treaty by one of two contracting parties gives to the other party the option either of constraining by force the defaulting party to fulfil its engagements, or to hold itself released in its turn from its obligations under the Treaty. The *casus fœderis* in cases, where there are only two parties to a Treaty, is simple, but it becomes complicated, where there are several parties to a treaty, and more particularly where the Treaty contains engagements, which do not equally and directly affect all the parties. With regard to the right of the parties, who are directly affected by those engagements, to enforce them against one another without the co-operation of the Co-Signatories of the General Treaty, there can be no doubt, where the engagements are also the subjects of special and separate Treaties, which have been annexed to the General Treaty, but with regard to their right to hold themselves released from their own obligations under those separate Treaties, without the consent of all the Signatories to the General Treaty in cases where the separate Treaties have been violated, there has been no settled practice, to which reference can be made as evidence of a common conviction of Nations on the subject.

In fact, great doubt has been cast upon the

subject by the difference of opinion which was manifested to Europe in 1846 as existing between France and England on the one hand, and Austria, Prussia, and Russia on the other, as to the effect of incorporating in the Principal Act of the Congress of Vienna, 1820, the separate Treaties concluded between the three latter Powers on the subject of the independence and neutrality of the free city of Cracow and its territory. The French and English views were that the Principal Act was an European Act, whilst the three Powers, who had guaranteed the independence and neutrality of Cracow, maintained that it was only a General Record of the special and separate Treaties. All doubt may henceforth be considered to be set at rest as regards a General Treaty to which several separate treaties are annexed, and declared to have the same force and validity as if they formed part of the General Treaty, inasmuch as Prince Gortchacow having raised the question in his Circular Despatch, the Seven Powers have solemnly recorded their recognition of the principle, that no Power can liberate itself from the engagements of such a Treaty, nor modify its stipulations without the consent of all the contracting parties. A similar observation will apply to the Protocol of Paris of 16 April, 1856, as regards the interpretation to be given to the Declaration of Maritime Law of the same date. The Plenipotentiaries agreed under that Protocol, that the Powers which had signed the Declaration, or had acceded to it, "cannot hereafter enter into

any arrangement in regard to the right of neutrals in time of war, which does not at the same time rest on the four principles, which are the object of the Declaration."

The deliberations of the Congress of Paris of 1856 have given a great impulse to the exertions of philanthropists to mitigate the severities of war, and have raised their hopes that nations may cease to have recourse to war, wherever the subject matter in dispute between them is capable of being adjusted upon considerations of superior right. One influential school of philanthropists is working with a view to render the results of war so valueless that no sane Nation would enter upon a war; another important body boldly condemns war as an unreasonable proceeding, and advocates the establishment of tribunals of arbitration for the settlement of all international disputes. Both of these schools have laudable objects in view, and the latter school is justified in invoking the Protocols of the Congress of Paris as giving countenance to its efforts. The former school, on the other hand, is not so clearly warranted in appealing to the Declaration of Paris, as involving in its first Article, by which Letters of Marque are declared to be abolished, the principle that the private property of enemy-subjects should be exempt from belligerent seizure both on land and on sea. The real object of the Declaration of Paris was to make war, as a state of international relations, less burdensome to Neutrals. The first step was accord-

ingly to declare that War on the High Seas should be carried on only by National ships; the second step was to limit belligerent interference with Neutral commerce to those cases in which that commerce was contributing to sustain the enemy's defence; the third step was to abolish what have been termed paper-blockades, by declaring that blockades ineffectively maintained should not be binding on Neutrals. The benefits of the Declaration of Paris were properly extended to Neutrals in the war which France and England jointly carried on against the Emperor of China in 1860, notwithstanding that China was not a party to that Declaration, but no immunity from capture was conceded during that war by the Allied Powers to enemy merchant vessels, as has been erroneously stated by some writers. The Order in Council on the subject (March 7, 1860) has been printed in the eleventh volume of Mr. Hertslet's Collection of Treaties, p. 110.

A novel principle, however, has been introduced into the wars, in which Austria was engaged against Prussia on the one hand, and against Italy on the other in 1866, namely, that enemy merchandise and enemy merchant ships should be exempted from capture on the High Seas, on condition that the enemy observed reciprocity. A Decree to that effect was issued by Austria on 13 May, 1866, which was affirmatively responded to by Prussia on 19 May, 1866, and by Italy on 20 June, 1866. On the breaking out of hostilities between the

Confederation of North Germany and the French Empire in 1870, the King of Prussia published at Berlin a Decree (16 July, 1870), exempting all enemy merchant vessels from capture without any condition of reciprocity, but as France continued to exercise her customary right of belligerent capture against enemy merchant vessels, the Emperor of Germany annulled the Berlin Decree by an Imperial Ordinance dated from Versailles on 19 January, 1871. These and similar measures testify to the general desire of the European Governments to mitigate the practice of warfare, where their own safety does not require the enforcement of its more severe rules. In the wars of 1866 it was evidently for the convenience of Austria not to have to send an armed fleet into the Baltic to protect her commerce, and Prussia was reciprocally benefitted by not having to send an armed fleet into the Mediterranean, whereas in the war of 1870 it was more for the advantage of Prussia than of France that enemy merchandise and enemy merchant ships should be exempt from belligerent capture, and accordingly France did not respond to the advances of Prussia.

The employment of force by one State to coerce another, where such States are independent communities, has no justification but necessity arising out of the fact that the State, which it is sought to coerce, either has refused to do justice, or is intent on working injustice. A *casus belli*, however, is rarely determined by considerations of right. That

recourse is for the most part had to war from motives of personal or of national ambition is as patent in the present day, as it was at the commencement of the present century. The history of the last ten years supplies overwhelming evidence of this fact. On the other hand, the same period is remarkable for the number of international disputes, which have been referred to arbitration, and have been settled without recourse to war. These disputes were for the most part about territory or about property, and the example of great Powers may be cited, as testifying that recourse may be had to arbitration in such cases without any derogation from the dignity of an Independent State. It may also merit observation that great Powers have on several late occasions referred questions in dispute between them to the arbitration of private individuals, one of the most remarkable instances being a controversy which arose out of the Treaty between the United States and Paraguay, in which the question at issue between the two Powers was referred to the arbitration of an American citizen, Mr. Andrew Johnson of Tennessee, who decided the question against the United States. A want indeed has been felt of a Code of Procedure for the guidance of International tribunals of Arbitration. It has been one of the first objects of the Institute of International Law, founded at Ghent in 1873, and it is peculiarly within its province as a Council of Jurists, to prepare such a Code, and accordingly a Code, which has been drawn up by Dr. Goldschmidt, Judge of the

Supreme Court of Appeal of the German Empire, has been carefully revised by the Institute, and may be expected to be published within a short time.

Mr. Henry Richard, M.P., who is steadfastly labouring to bring about an agreement amongst Nations as to the wisdom of having recourse to arbitration instead of war for the settlement of international differences, has justly called attention, at a meeting of the Association for the Reform and Codification of the Law of Nations held lately at the Hague, to the fact that there is some uncertainty as to what is the Law of Nations on many subjects which may come into controversy between Nations, and that International Law is not at present in a satisfactory state. There is no doubt that the evidence of what is Law between Nations is not always forthcoming in writing, and that the external relations or conditions of nations, as of individuals, are continually undergoing changes, for which the recognised rules of International intercourse may not have made provision, but it would be a misapprehension to suppose that there is nothing like a system of Law acknowledged and agreed upon amongst Nations. If we are to acquiesce in the narrow definition of Law, which has found favour with many writers on Municipal Institutes, and which limits the idea of Law to one of the forms in which it is expressed, it may be admitted that there is no Law of Nations, for there is no common Superior to impose his will upon

independent Nations. But Law in the highest sense of the term, in which it is used to designate the rules which guide the conduct of intelligent beings, is the expression of their Unity of Will (Einheit des Willens), and as the Law of any one people is the expression of its common conviction, so the Law of Nations is the expression of the common conviction of Nations. The existence of such a common conviction is evidenced in the case of Nations either by their practice or by international Acts in the form of Declarations or Conventions, just as in the case of a people the evidence of its common conviction is to be found in its Customs, or in the written decisions of its Courts, and in the enactments of its Legislature. It may be true that as regards the practice of Nations the facilities are not so great for ascertaining that practice, as the facilities for ascertaining the customs of a people, but the principle involved in both inquiries is one and the same, and if there be an ascertained practice of Nations in any matter, it may be taken to be the expression of their Unity of Will, and as such is to be regarded as the Law which governs their mutual relations to one another in that matter. On the other hand, it may be conceded, that as the greater part of the Law of Nations, which is evidenced by the practice of Nations, is *jus non scriptum*, there is more uncertainty as to what is the Law of Nations in many matters, than is consistent with the general advancement of knowledge on other subjects in the present day, and that it may well

deserve the consideration of Statesmen and of Jurists, whether International Law may not be brought into a more satisfactory state by being reduced into writing[1]. Such indeed seems to be the conviction of jurists in both hemispheres. Mr. David Dudley Field, of the United States, has recently published the Draft Outlines of an International Code, which has been translated into Italian, and is being now translated into French; whilst Professor Bluntschli, of Germany, has lately published a classical treatise entitled "International Law Codified," which has been translated into French. Meanwhile an International Association has been formed for the preparation of a Code of the Law of Nations, the labours of which body must of necessity be slow, if they are to be sure, and such an Association can only hope to be successful in its enterprise, if it bases its work on the common conviction of Nations, the *consensus gentium*, as to the fitness and sufficiency of its conclusions. Its first effort as regards Private International Law has been made according to a sound method, and it may be hoped that by following up that method it will succeed in its present enterprise of Codifying the Law of Nations on the subject of Bills of Exchange, which have been aptly termed the International Currency of the civilised world.

[1] There is a difficulty, which besets the Codification of the Law of Nations, that as regards the Public branch of that Law there is no Court to determine its interpretation, if there should be any dispute between Nations as to the meaning of a written Law. The history of the Bulwer-Clayton treaty and of the Three Rules of the Washington treaty show how formidable is this difficulty, even when both the contracting parties speak a common language.

An important effort is being made by a distinguished School of Jurists to shift the foundations of Law on which War itself rests, and just at the moment when the right of private War has been effectively blotted out from the volume of Public European Law by the Declaration of Paris abolishing Letters of Marque, a new definition of War has been propounded, under which Nations are to renounce the exercise of the right of War against one another, and War, like Diplomacy, is to become the exclusive business of Governments. If the projects of this estimable body of men were likely to pave the way to the abolition of all War, and to the substitution of International Arbitration in the place of War, just as the Wager of Battle contributed to put an end to private War among the members of particular States, and led up to the adoption in its place of Trial by the Assize, all good men would wish them God's speed in their enterprise. But such is not the interpretation which the States, that have welcomed this new definition of War, have attached to it, nor is such the consequences which they anticipate in accepting it. The consequence which they contemplate is that every Government shall enforce on its own people a system of compulsory military service, the *damnosa hereditas* of the first French Revolution[1], and

[1] What a scourge to humanity the military conscription of modern times is calculated to prove, cannot be better illustrated than in the memorable words addressed by the Emperor Napoleon I to the late Prince Metternich, at Dresden, on the Emperor's return from Moscow. "What are to me a million of lives? I have sent to death three hundred thousand

that the States of Europe shall be always under arms. As a corollary to this new definition of War, it is proposed to proclaim the sanctity of private property in warfare. If it were possible to persuade Nations to apply such a principle effectively to continental warfare, it would be a happy device to arrest at once the inroad of an invading army, for no such inroad could be made into an enemy's country without a violation of private property. The very ground on which a belligerent army must encamp is private property; the crops which it must trample under foot in its march are private property; the farm-buildings and the villages which it must devastate and destroy in battle are private property. The vicissitudes of War also must sometimes render the exaction of supplies for the support of an army moving in an enemy's country imperative even in the case of well disciplined troops. Respect therefore for private property in a Continental War must always be a question of degree. To destroy private property, where such destruction is necessary to facilitate the operations of War, is as justifiable from the necessity of the case as the destruction of public property; to seize it by way of requisitions, to the extent to which such requisitions are necessary for the support of a belligerent army, is justifiable on the same principle as the War itself on which the army is en-

Germans to spare my French subjects" (Que me font, à moi, un million d'hommes? J'ai fait tuer trois cent mille Allemands pour sauver mes Français). The author had the words of the conversation from the late Prince himself. M. Thiers in his Histoire du Consulat et de l'Empire, Livre 49, has given an imperfect version of them.

gaged. But as it has been found in practice to be for the true interests of a belligerent army to make formal requisitions rather than to pillage, so it has been found to be for its true interests to make compensation for its requisitions, rather than to exact them without payment. The experience of the Spanish army, which co-operated with the British army in the invasion of France in 1813, amply testified to the former fact, whilst the experience of the British army was fully corroborative of the latter[1]. But no Belligerent Power has admitted as yet in practice any obligation on its part to pay for the supplies which it may have to levy in an enemy's country, much less any duty on its part to abstain from exacting those supplies by requisitions upon the inhabitants. That the States, which are disposed to accept this new definition of War, are not prepared to abandon the right of an invading army to levy supplies upon the inhabitants of an invaded country, is apparent upon the face of the Draft Project of an International Declaration concerning the Laws and Customs of War, which has been lately revised at a Conference in Brussels, in which the Delegates of those States took part, and which it is proposed to take further into consideration at a second Conference to be held at St. Petersburgh.

One feature of the present civilisation is that the application of steam-power to ships has not only

[1] Despatches of F. M. the Duke of Wellington, by Lieutenant-Colonel Gurwood, vol. xi. p. 395, p. 420, p. 502, p. 551.

rendered an armed ship a more formidable engine of War than heretofore, but has enabled a fleet of unarmed ships to become a reliable base of military operations against an enemy's territory, in fact to serve as an extension of the territory of the belligerent, from which the invasion of an enemy's territory may be successfully directed and supported. The Crimean War was a striking illustration of the territorial aptitude of a fleet of transport and store ships under the improved means of navigating them to form such a base of military operations. One consequence of this has been that there is a growing conviction amongst Nations that an increased responsibility has devolved upon States, which desire to remain neutral between two friendly Powers, which are at War with each other, to prevent the equipment and despatch from their ports of ships, which there is reasonable cause to believe will be employed in the military or naval service of either Belligerent, although those ships are private property. Another consequence has been that Neutral States have felt themselves called upon in good faith to place greater restrictions on the hospitality to be shown in their ports towards ships under a belligerent flag. It was an object of the Treaty of Washington of 1865 to concert a Code of Rules on the former subject, which should be binding henceforward on both the contracting parties, and should be recommended by them to all civilised States for general adoption; but, unfortunately, when the arbitrators under that Treaty came to

apply "the three rules" of that Treaty, it was found that the arbitrators were not all of accord as to the proper interpretation to be given to them, and "the three rules" having served their purpose for the settlement of a passing dispute, have been allowed to remain a dead letter, as regards their contemplated incorporation into the General Law of Nations. But one thing has resulted from the adoption of those rules for the purpose of deciding amicably a controversy between Great Britain and the United States, that both those Powers have placed on record before an international tribunal their conviction, that ships, which are capable of being employed in the military or naval service of a Belligerent Power, have peculiar qualities, which distinguish them from other chattels which are suitable for warlike purposes, and that the circumstance of their being private property is of no weight as regards the responsibility of a Neutral Power to prevent their equipment and their despatch from its ports, if it wishes to maintain good faith. The members of the Institute of International Law, in their Session at Geneva in 1874, took "the three rules" of the Treaty of Washington into their consideration, and pronounced an opinion that "the three rules," although in point of form they were open to objection, were in substance the clear application of a recognised principle of the Law of Nations. There is an apparent contradiction of principle between that opinion and the proposal, which has been favourably entertained by a majority of the members of the Institute in their

recent Session at the Hague, that the right of capturing Enemy's ships on the High Seas, if they are private property, should be denied to a Belligerent. Besides, as the modern Law of Nations has invested a ship, notwithstanding it is private property, with a territorial character on the High Seas in time of peace, there seems no sound reason why a ship should be divested of its territorial character in time of War on the ground of its being private property, more particularly when the very circumstance of War invests it with peculiar territorial qualities, which are not a fiction of Law, but are of substantial and indispensable service for the purposes of War, where one of the belligerent parties is a Maritime Power.

TRAVERS TWISS.

TEMPLE, LONDON,
October 4, 1875.

OF THE

RIGHTS AND DUTIES OF NATIONS

IN TIME OF WAR.

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THE LAW OF NATIONS.

CHAPTER I.

SETTLEMENT OF INTERNATIONAL DISPUTES.

Nature of International Differences—Duty of Self-preservation—Right of International Action—Amicable Conference—Compromise—Arbitration—Mediation—Congresses of Christian Powers—Duty of Moderation—Retorsion—Embargoes—Practice of Marque and Reprisals—Letters of Contremarque—Growth of the Admiralty Jurisdiction—Armemens en Course—Grant of Reprisals—Reprisals consistent with Peace—Negative and Positive Reprisals—Special and General Reprisals—The Grand Pensionary De Witt—Conditional Declaration of War—Chief Justice Hale—Reprisals against Spain in 1739—Reprisals against the two Sicilies in 1839—General Reprisals not always lawful—Sir Leoline Jenkins—Grotius—Bynkershoek—Vattel—Reprisals against Persons—Political Envoys exempt from Reprisals—Case of the Duc de Belleisle—Case of the Envoys of the Confederate States of America in the British packet Trent—Regulation of the Practice of Marque and Reprisals by Treaties—Renunciation of the Practice of Marque by the Congress of Paris in 1856.

Differences between Nations.

§ 1. NATIONS being independent political bodies, holding intercourse with one another upon a footing of equality and reciprocity, are liable, in satisfying the duties of Natural Society, to have differences

with one another upon questions of mutual Right. These differences may arise, either by reason of a Nation refusing to perform a good office to another Nation, to the performance of which the latter considers itself to have a claim of Right; or by reason of a Nation suffering an ill office from another Nation, from which the former considers itself entitled of Right to be exempt. "The differences," says Vattel[1], "which arise between Nations or their rulers are on account either of contested rights or of injuries received. A Nation ought to maintain the rights which belong to it; on the other hand the care of its own safety and glory forbids it to submit to injury. But in fulfilling the duty which a Nation owes to itself, it must not forget its duties to other Nations." It is in the practical adjustment of these two principles, according to the circumstances of each individual case, that we discover the rule for appeasing the disputes which may arise between Nations upon questions of Right. A Nation cannot claim anything as of Right due to itself, which would be injurious to another Nation; neither can it claim in redress for an injury, which it has undergone, anything which would be inconsistent with the Right of another Nation. Equality and reciprocity are fundamental conditions in measuring the remedies for international Wrong, equally as they are fundamental conditions in determining the Right, the violation of which constitutes international Wrong.

§ 2. The perfection of every political community consists in its aptitude to fulfil the ends of civil society; and one of the chief ends of civil society is to secure, by the cooperation of all the members of a political community, a greater degree of well-being to each individual than he could obtain by his own

[1] Droit des Gens, L. II. c. 17. § 323.

unaided exertions. Accordingly, in the act of political association, by virtue of which a multitude of men constitute themselves into a State or Nation, each individual enters into an engagement with the body to promote the general welfare; and the State or Nation in return enters into an engagement with each member to facilitate for him the means of supplying his necessities, and to protect and defend him. It is manifest therefore that the maintenance of the political association itself is an essential condition for the fulfilment of these reciprocal engagements, and the State or Nation is thus under a primary obligation to preserve itself; in other words, Self-preservation is a primary duty of National Life. This duty of Self-preservation on the part of a Nation implies, as a corollary, the duty of preserving each of its members. It owes this duty in the first place to itself, since the loss of one of its members impairs the integrity of the body, and at the same time weakens it. It owes this duty also to each of its members in particular, for the individuals, who compose a Nation, have united themselves together for their mutual defence and common advantage; and none of them can justly be deprived of this Union, and of the advantages which he expects to derive from it, whilst he fulfils on his side the conditions of it. The body of a Nation cannot abandon a province, or a town, or even a single individual member, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons founded on considerations of the public safety[2].

Duty of Self-preservation.

§ 3. The obligation of a Nation to preserve itself and to preserve all its members, is not limited to those matters only which affect its internal constitution, but extends to its external relations with other

[2] Vattel, Droit des Gens, L. I. c. 2. § 17.

Nations; in other words, to those matters which regard the intercourse of itself as a political community, or of its members individually, with any other Nation as such, or with the several members thereof. The right of Self-preservation accordingly gives to a Nation a moral power of acting in regard to other Nations in such a manner, as may be requisite to prevent them from obstructing its preservation or its perfection[3]. This Right is a perfect Right, since it is given to satisfy a natural and indispensable duty; and our Right may frequently fail to be respected, and its effects will be uncertain, unless we may use compulsion towards those who refuse to fulfil the corresponding obligation. A Nation has accordingly a right to resist any attempt on the part of another Nation to injure it, and in case that it has suffered an injury from another Nation, to exact complete reparation for it. At the same time it is bound to abstain from doing any injury to another Nation, and to give adequate satisfaction for any injury, which it may have inflicted upon it. An individual citizen is at liberty to waive his right and to forgive an injury, without incurring any increased risk to his life or property, for he lives under the protection of the Civil Magistrate, and may invoke his aid against any ungrateful and malicious fellow-citizen, who may have been encouraged by his indulgence to renew the offence. But a Nation cannot appeal to any superior Power on earth, in case it should have forgiven an injury, which has been inflicted upon it by another Nation, and thereby have encouraged it to offend again. A more powerful Nation may indeed overlook an injury, which it has received from a less powerful Nation, without any derogation to its future safety; but between Powers which are nearly

[3] Vattel, L. II. c. 4. § 49.

equal, the submission on the part of one of such Powers to an injury, without insisting upon complete satisfaction from the other Power, is almost always attributed to cowardice or weakness, and seldom fails to subject the injured party to further wrong of a more atrocious character. A Nation is accordingly bound, in the presence of another Nation, to maintain its Right, and to seek satisfaction for wrong, under the penalty of forfeiting its character of an independent political body; for to acquiesce tamely in an injury which has been inflicted upon any of its members by another Nation, would be equivalent to the admission of its inability to secure to its members the enjoyment of their Right without the consent of the other Nation; in other words, it would be a virtual acquiescence on its part in a state of dependence upon the other Nation. A Nation has therefore a moral Right of Action against other Nations, which withhold from it its Right, or have inflicted injury upon it. But this Right of Action against another Nation is capable of being exercised either by an appeal to reason, or by a recourse to arms. But a recourse to arms, although it may ultimately assert and enforce substantial justice to be done by the Nation, which has been a wrong-doer, brings with it, as an indirect but necessary consequence, such a train of evils and calamities resulting to innocent individuals, that an appeal to reason should always be made in the first instance, unless there is evident peril to the safety of a Nation, if it does not have immediate recourse to arms.

Right of International Action.

§ 4. An appeal to Reason may be made in various ways. *Amicable Conference* is the first and most obvious mode; and it commends itself to Nations by two weighty considerations. Men will often concede to Reason what they feel bound to deny to Force; for, to

Amicable Conference.

give way to argument savours of generosity, or at least does not necessarily imply any inferiority; whilst men for the sake of preventing war will allow of several things, to which they could not be compelled by force of arms. The object of *Amicable Conference* is to examine candidly the subject in dispute, with a view to do justice, so that the party, whose Right is found to be the more doubtful of the two, may voluntarily renounce it. To renounce a right after discussion does not necessarily imply a want of power to enforce it, which might encourage an enemy to make further encroachment; but, on the contrary, is consistent with a wish to do justice. There are even occasions, when it may be advisable for the Nation, which is found to have the clearer Right, to renounce it for the sake of preserving Peace and gaining a friend; for to renounce a Right in this manner is not to abandon or neglect it, and in yielding up amicably what you are entitled to maintain by force, you conciliate an opponent. Amicable Conference will generally lead to an equitable adjustment of the conflicting pretensions of Nations; and where the subject in dispute is difficult to adjust by the standard of strict Right, it tends to facilitate a *Compromise*, which is for the most part a preferable alternative to war. As examples of *Compromise*, we may refer to the settlement of the boundary between the territory of the United States and the British possessions in North America. In the case of the North-east Boundary[4] it had been found impracticable to ascertain a line, which would answer the conditions of the previous treaty-engagements between the two Powers: in the case of the North-west Boundary[5]

Compromise.

[4] Treaty of Washington, 9 August, 1842. Martens, Nouveau Recueil Général, III. p. 456.

[5] Treaty of Washington, 15 January, 1846. Ibid. IX. p. 27.

Great Britain thought it consistent with her dignity to recede from her strict right, and adopted a compromise from considerations of convenience.

Resident Embassies.

The established practice amongst Nations, of accrediting Resident Envoys to foreign Courts, facilitates in a high degree the settlement of international disputes by amicable conference; and as long as Resident Embassies continue to be maintained as normal channels of international communication, there will be a permanent guaranty amongst nations, that some attempt will always be made to settle their disputes by reason, before they have recourse to arms. This guaranty will be increased in strength, in proportion as Diplomacy acquires the character of a Science, and the Diplomatic Envoy comes to be selected from those persons, who have made the Rights of Nations their peculiar study. The Roman people seem at a very early period of their history to have appreciated the importance of submitting their disputes with other Nations to a council of judges, well versed in the science of international Right, before they had recourse to arms; and it was the province of the College of Fecials not merely to advise the State in negotiating peace and alliance, but to furnish, when required, ambassadors qualified to demand redress for injuries received from other Nations, and to declare war against them, if adequate redress should not be granted[6].

Arbitration.

§ 5. *Arbitration* is another method of bringing international disputes to a peaceable termination, where direct conferences between the Representatives of the Nations, which are at issue upon a question of Right, have failed to bring about an amicable settlement. When nations have agreed to refer any

[6] Cicero de Officiis, L. I. c. 13. Cicero de Rep. L. II. c. 17. Livii Hist. L. I. c. 32.

question in dispute between them to Arbitration, their good faith is pledged to abide by the decision of the Arbitrator, unless the decision should involve a clear departure from the terms of the reference, or should be in absolute conflict with the rules of justice and therefore incapable of being the subject of a valid international compact, or should be the manifest result of fraud and collusion with one of the parties. A departure from the terms of the reference was alleged on the occasion, when the United States of America and Great Britain agreed by the Convention of London (29 Sept. 1827[7]) to refer the points of difference which had arisen in the settlement of the boundary between the British and American dominions, as described in the fifth Article of the Treaty of Ghent, to some friendly Sovereign or State, who should be invited to investigate and make a decision upon such points of difference; and they further agreed that the decision of the arbiter, when given, should be taken as final and conclusive, and should be carried without reserve into immediate effect by Commissioners appointed for that purpose by the contracting parties. Notwithstanding the absolute terms in which the parties to this Convention bound themselves to acquiesce in the decision of the Sovereign arbiter, the Senate of the United States considered that the opinion of the King of the Netherlands on the case referred to him, which he delivered in writing to the Plenipotentiaries of the United States and of Great Britain on 10 Jan. 1831, was not obligatory on the United States[8], on the ground that the award did not follow the submission, but merely

Treaty of Ghent.

[7] Martens, N. R. VII. p. 491. British and Foreign State Papers 1826, 7. p. 1005.

[8] Message of President Jackson, 6 Dec. 1831. British and Foreign State Papers 1830, 31. p. 957. Message of 4 Dec. 1832. ib. 1831, 32. p. 244.

recommended a conventional line, which it designated[9]; and accordingly, upon the advice of the Senate, the President of the United States opened a further negotiation with the British Crown. Cases of fraud and collusion on the part of an international arbiter are rare. Puffendorf[10] alludes to an instance in which the Emperor Maximilian and the Doge of Venice submitted their differences to the arbitration of Pope Leo X, while each of them privately tampered with the Roman Pontiff to declare on his side.

Cases in which the decision of the arbitrating Power is in direct conflict with the rules of justice are equally rare. They occur for the most part where the arbiter has some advantage in view, which may accrue to himself from an unjust decision, and where he is sufficiently powerful not to fear the resentment of the parties, who have deferred the settlement of their conflicting claims to his decision. Of this character was that decision of the Roman people, which Livy narrates with very strong reprobation, when the cities of Ardea and of Aricium having deferred their dispute in regard to the sovereignty over a certain country to the arbitration of the Roman people, the Assembly of the Roman Tribes adjudged the territory in controversy to be the property of the Roman State[11]. Grotius[12] has very justly observed, that although in a doubtful case of title both Nations are bound to seek for conditions of compromise rather than to have recourse to war, yet this obligation presses more strongly on the Nation which makes a claim, than on the Nation which is in

Ardea and Aricium.

[9] American Annual Register, 1830, 31. p. 146.

[10] Puffendorf, Law of Nature and of Nations, L. V. c. 13. § 4. Guicciardini Istoria, Tom. VI. p. 141.

[11] Livii Historia, L. III. c. 71.

[12] Grotius, L. II. c. 23. § 11. Wolff, Jus Gentium, § 576.

possession of a thing; for it is agreeable not only to civil but to natural law, that the possessor of a thing in all cases of equal claim should be in a more favorable position than the party who seeks to disturb him: *Melior est conditio possidentis.* A claimant accordingly, who may be satisfied of the goodness of his cause, but cannot prove that a party in possession is wrongfully in possession of a thing, cannot lawfully make war, because he has not the right to compel the other to give up possession. It is not necessary that Nations, in referring any matter in dispute between them to the arbitration of a third party, should select an independent State or a Sovereign Prince as arbiter. It was by no means unfrequent in the middle ages for Nations to refer the decision of matters, which might be in controversy between them, to the arbitration of the Faculty of Law in some famous University. Thus we find the Doctors of the great Law School of Bologna continually called upon to furnish arbiters in the disputes between the Italian Republics. On the other hand, the most powerful States in modern times have not hesitated to refer to Commercial Tribunals the decision of questions, which may have arisen between themselves and a less powerful State, and in which the commercial interests of their subjects have been concerned. Thus Great Britain has on two very recent occasions agreed with Portugal to refer to the Senate of the city of Hamburg the decision of claims made by British Merchants against the Portuguese Government, and the Senate of Hamburg has undertaken on both occasions the arbitration; and it has decided the dispute on the first occasion in favor of the Portuguese Government[13], and on the second occasion in favor of the British Merchant[14].

Law School of Bologna.

Senate of Hamburg.

[13] Croft's Case, 1858.

[14] Shortridge's Case, 1861.

§ 6. *Arbitration*, writes Vattel[15], is a very reasonable mode, and one that is perfectly conformable to the law of Nature, for the decision of every dispute which does not directly interest the safety of a Nation. Accordingly we find it sometimes a matter of stipulation in treaties of alliance between independent States, that their disputes shall be submitted to arbiters, in case they cannot adjust them by amicable conference. Such a provision is more particularly a feature of Federal Pacts, under which neighbouring States associate themselves together for the permanent purpose of mutual defence, and are recognized internationally in the character of a Confederated Body of States. Thus it was provided by Article XI of the Act which constituted the late Germanic Confederation, that the Confederated States should not make war upon one another under any pretext whatsoever, nor should prosecute their differences by force of arms, but should refer them to the Diet. The Diet on the other hand undertook to mediate between the States which might have differences with one another; and if its mediation should fail, then to refer their dispute to an *Austegral* tribunal (Austrägalinstanz), to the judgment of which the litigant parties were to submit without appeal. After a similar design was the project of the Abbé St. Pierre for securing a perpetual peace amongst the European Powers, which was circulated in Europe shortly after the conferences which led to the Peace of Utrecht, and at which conferences the Abbé was present. By a kind of pious fraud, with a view to recommend it more strongly to the adoption of Sovereign Princes and their ministers, he attributed the project to King Henry IV. of France and his

Germanic Confederation.

Abbé St. Pierre.

[15] L. II. c. 18. § 329.

minister Sully [16]. He subsequently developed his plan more fully in 1729, and based it upon the state of possession amongst the European Powers as settled by the treaties of Utrecht, seeking to make that state of things perpetual by preserving the equilibrium of forces between those Powers, and by adjusting all controversies between them by pacific means. With this object in view he proposed that the members of the Christian commonwealth of Nations should renounce the right of making war upon one another, and accept the mediation of an European Diet for the settlement of their mutual differences, three fourths of the votes being necessary for a definitive judgment [17]. This scheme in its speculative details has many striking features of resemblance to the machinery of the late Germanic Diet.

Mediation. § 7. *Mediation*, whereby a third Power interposes its good offices to bring about the peaceable settlement of a matter which is in dispute between two Powers, differs from *Arbitration* in this respect, that the decision of an arbiter is obligatory, whilst a mediator merely gives counsel and advice. It is perfectly lawful for an independent Power to offer to mediate between other independent Powers which are either preparing for or actually engaged in war, and to suggest to them a compromise, if a claim of right has

[16] Projet de Traité pour rendre la Paix perpetuelle entre les Souverains Chrétiens, pour maintenir toujours le commerce entre les Nations, et pour affermir beaucoup davantage les maisons souveraines sur le trône, proposé autrefois par Henri le Grand Roi de France, agréé par la Reine Elizabeth, par Jaques I. et par la plupart des autres potentats de l'Europe. Utrecht, 1713.

[17] Wheaton's History of the Law of Nations, p. 262. It is not improbable that the project of the Abbé St. Pierre may have suggested to Prince Metternich some of the details of his plan for organising the Diet of the late Germanic Confederation.

been set up by either of them; or in case the dispute should relate to an injury which has been inflicted upon either of them, to advise that a reasonable satisfaction for the injury should be offered and accepted. It is obviously the duty of an individual, when he is not under any obligation to take part in a dispute between his friends, to endeavour to bring about an amicable settlement between them; whilst it is frequently the interest of a Nation to prevent war breaking out between other Nations, for some of the sparks of the fire which is kindled in its neighbourhood may possibly reach it; whilst, on the other hand, it may be dangerous to a Nation to have both or either of its neighbours ruined. A care for its own safety will therefore justify a Nation in interposing its good offices between disputing Nations. The interposition of a Nation to prevent a war between two other Nations is an act of a totally different character from the intervention of a Nation in the domestic affairs of another Nation; and whilst the latter is objectionable on principle, as an encroachment on the just rights of an independent political community, the former is not only in strict law an international proceeding, but may be the imperative duty of a Nation, whenever the occurrence of war would oblige it to take part with one or other of the belligerents. Puffendorf[18] holds that two or more neutral Nations, if they have a common interest that a war should be terminated, may lawfully agree upon what terms peace ought to be concluded between the belligerent parties, and may thereupon prescribe such terms of agreement to the belligerents, with a manifesto that they will join their forces against the party which refuses those terms; and that this sort of mediation

[18] Law of Nature and Nations, L. V. c. 13. § 7.

is the more commendable, if it puts an end to a war which would prove destructive to one or both of the parties. Upon some such principle, Russia, France, and Great Britain, interposed as mediators between the Ottoman Porte and the Hellenic people, and secured on the part of the Porte the recognition of an independent kingdom of Greece, under their joint guaranty. Bynkershoek[19] holds that it is not allowable for a Nation to interpose between other Nations and to compel them to make peace; but the practice of Nations is opposed to his views, and one of the instances which he cites seems to suggest a principle, which rather sanctions the right of interposition, than militates against the existence of this right. Thus France, England, and Holland united to compel Sweden to make peace with Denmark on 21 May 1659, at a moment when Sweden was on the point of entirely subjugating Denmark. The extinction of the international life of a State, in the continued existence of which, as a member of the family of Nations, all other Nations have an interest, is an event respecting which all Nations may claim to have a voice, and, if they please, to take up arms to prevent it. War between Nations, in the sense in which it imposes the duties of Neutrality upon other Nations, is a contest for the attainment of Right, and not a struggle to accomplish the ruin of either party. Grotius[20] maintains that war may be justly undertaken by any Nation against a Nation which prosecutes its revenge with malice, and exceeds the just measure of punishment in avenging a wrong which it may have suffered from another Nation. Thus a powerful Nation, under the pretext of injury received

Kingdom of Greece.

Sweden and Denmark.

[19] Quæst. Jur. Publ. c. 25. § 10.

[20] De Jure Belli, L. II. c. 20. § 40.

from a weaker Nation, might declare war against it, and proceed to subjugate it, when the latter was prepared to make adequate redress. Under such circumstances any Nation would be justified in mediating to prevent war; and as a recourse to arms on the part of the more powerful Nation would be without lawful excuse after an offer of complete redress had been made by the offending Nation, any mediating Power would be justified in such a case in interposing to compel the more powerful State to remain at peace. A war waged under such circumstances would be an unjust war on the part of the more powerful Nation; and it is at all times the duty of Nations to interpose and arrest the perpetration of injustice, seeing that in an unjust war every Nation may rightfully side with the party which is wrongfully attacked.

§ 8. It is not always easy for a third Power, which offers to mediate between two contending Powers, to satisfy them both of the integrity of its intentions in offering its mediation, and if it should advise either to remit something of its pretensions, to preserve a character for impartiality. Hence it becomes advisable, when war threatens to break out between any two Nations, in the necessary absence of any constituted tribunal before which the plaint of a Nation can be brought for adjudication, that two or more Nations should offer their joint mediation to maintain peace. Grotius[21] holds that it would be not only useful, but that it is in some respects necessary, that Congresses of the Christian powers should be held from time to time, in which the controversies, that may have arisen amongst any of them, may be settled by others whose interests are not affected by them, and in which

Congresses of Christian Powers.

[21] De Jure Belli, L. II. c. 23. § 8. 4.

measures may be taken to compel disputing parties to accept peace on equitable terms. The practice of the Sovereign Powers of Europe since the peace of Westphalia has been to cooperate in a policy of Mediation, wherever there has been probable danger of the Balance of Power, as established by the Treaties of Osnabrück and Munster, being effectively disturbed. A system of European Concert has thus been maintained, with slight intermissions, since that time by Conferences or Congresses of the European Powers. A Congress[22] is an assembly of Plenipotentiaries, appointed to find out means of conciliation, and to discuss and adjust the respective pretensions of the contending parties, who should always be invited to take part in the deliberations of the Congress. One of the most recent instances of this form of joint Mediation is furnished by the Conferences of Vienna, commenced on 15 March 1855, and in which Austria, France, and Great Britain endeavoured to mediate between Russia and the Ottoman Porte, with a view to prevent a war between those Powers, and to bring about an amicable settlement of their differences in the general interest of Europe. The Plenipotentiaries of the two contending Powers took part in the Conferences; and when the efforts of the Congress had failed to secure peace, the mediating Powers[23] sided with that Power, which in their opinion had been wrongfully attacked.

Conferences of Vienna.

§ 9. It is the duty of a Nation, when it advances a claim of right to a thing which it does not possess, to show a good foundation for its demand. Possession in the case of Nations gives rise to the Right of not being disturbed, unless the origin of the possession can be shown to have been wrongful. Hence

[22] Vattel, L. II. c. 18. § 330.
[23] Martens, N. R. Gén. XV. p. 633.

it is not justifiable for a Nation to disturb by force of arms another Nation which is in possession of a territory, if the claimant has only an uncertain or a doubtful title, but a claimant in such a case has a right to compel a possessor, even by force of arms if necessary, to come to an amicable discussion of the question of right, or to submit it to arbitration, with a view to settle the point in dispute by articles of agreement. If, on the other hand, a dispute should arise between two Nations on account of an injury received[24] by one of them, the injured party ought to follow a similar rule of proceeding, unless it is convinced that its adversary would not entertain with sincerity its proposal for an amicable reparation, or that the delay, which the discussion of the wrong would give rise to, would only expose it to greater danger of being worsted in an appeal to arms. This moderation is the more becoming, and as Vattel says, is in general cases even indispensable, since the act which a Nation may be disposed to regard as an injury, does not always proceed from a design[25] to offend it, and may be rather a mistake than an act of malice. Besides it frequently happens that the injury has been done by individuals without any sanction from the Nation of which they are members, and if satisfaction should be demanded from it, the Nation will not refuse to do justice. Instances are frequent in which Sovereign Princes have refused to countenance the wrongful acts of their subjects towards the subjects of other Sovereign Princes, and have thought it not a derogation from their independence, upon complaint made to them, to give satisfaction for the wrong. It is perfectly consistent with good faith for a Nation, which has received an injury, to make preparations for war,

Duty of moderation.

[24] Vattel, L. II. c. 18. § 331. 333. 337.
[25] Ibid. L. II. c. 18. § 338.

while it attempts by pacific negotiation to obtain reparation for the injury. For war must be presumed to be the necessary alternative, if amicable negotiation should fail, and the right of self-preservation warrants a Nation in taking measures to guard itself against hostile surprise.

§ 10. When a Nation cannot obtain redress in an amicable manner from another Nation, either for the refusal of a right, or the infliction of a wrong, it may proceed to do justice to itself in the former case by Retorsion, in the latter case by Reprisals. When a Sovereign Prince is not satisfied with the manner in which his subjects are treated according to the laws and customs of another Nation, he is at liberty to declare, that he will treat the members of that Nation in the same manner as his own subjects are treated. This is what is called by Vattel[26] Retorsion of Right. "There is nothing in this," he observes, "but what is conformable to justice and sound policy. No one can complain on receiving the same treatment which he has exhibited to others." Klüber[27] has instituted a distinction between Retorsion of Fact (retorsio facti) and Retorsion of Right (retorsio juris), and limits the application of the latter term to questions of Comity, as distinguished from questions of Right. But the distinction appears to have no practical value, and tends to cause confusion rather than greater clearness. It may be true that for offences against Comity, a Nation has no other remedy than to reciprocate the uncourteous conduct of the offending Nation, for a violation of Comity is clearly not the subject of a just war[28], as every Nation must be the final judge for itself of the nature and extent of the Comity or

Retorsion of Right.

Retorsion of Fact.

[26] Rétorsion de Droit, L. II. c. 18. § 341. Retorsio Juris, Wolfii, Jus Gentium, § 582.

[27] Klüber, § 234.

[28] Grotius, L. II. c. 22. § 16.

courtesy which it will show to other Nations. But there are many rights, for the refusal of which the proper remedy, as between Nations, is passive Retaliation, or in other words Retorsion. Thus if a Sovereign Prince should forbid to the subjects of another Sovereign Prince access to the ports of his territory for the purposes of peaceful commerce, the latter Prince may with justice retort the prohibition upon the subjects of the former in regard to his own ports. But the prohibition of all commerce would not be a suspension[29] of Comity, but a denial of a Natural Right, for the total hinderance of commerce would be contrary to the nature of human society, being the debarring of mankind, as St. Ambrose says, from sharing the goods of their common mother, which are scattered about for the benefit of all. Yet a Nation in such a case would not be justified in having recourse to war. In like manner, if a Nation chooses to grant to the subjects of another Nation special privileges within its territory, although it may be contrary to natural equity to exclude the subjects of other Nations from the enjoyment of similar advantages, yet such exclusion does not constitute a wrong which may be redressed by arms, but only justifies Retorsion or passive Retaliation. Active Retaliation, or the *Lex Talionis* in its full sense, has no place between Nations, for a Nation has no right to extend a penalty beyond what its own safety requires; and Retaliation which is unjust between individuals, would be much more unjust between Nations, because it would be difficult in the latter case to make the punishment fall upon the actual wrong-doers[30]. On the other hand, Sovereign Princes are held to participate so far in the wrongful acts of

Lex Talionis.

[29] Grotius, L. II. c. 2. § 18. L. II. c. 18. § 339. Klüber, § 234.

[30] Vattel, L. I. c. 13. § 171;

their subjects, and subjects are held to be so far amenable for the faults of their rulers, amongst which faults the foremost is their neglect to compel their subjects to do justice to the subjects of other Sovereign Princes, that they may reasonably be required mutually to share the inconveniences, which will result from a reciprocal rule of conduct being adopted by other Nations.

§ 11. If a Nation has refused to pay a debt to, or has inflicted an injury upon the subjects of another Nation, and the former has refused to make satisfaction or to give redress, the latter may proceed to do justice to its subjects by making Reprisals upon the former. Every political community takes upon itself the responsibility of the acts of its members in relation to other political communities, if, upon complaint made to it, it does not constrain the wrong-doers to make satisfaction. A Nation, as such, only takes cognisance of individual men as members of a Nation, and who, as such, belong either to its own political body, or to some other independent political body. If an individual is a wrong-doer, and is a member of its own body, the Governing Power of a Nation proceeds to exact satisfaction from him according to its own laws; but those laws being only operative within its own territory, a Nation cannot exact satisfaction in like manner from a member of another independent political body, who does not happen to be within its territory. It must in such a case demand at the hands of the Governing Power of the Nation, to which the offending party belongs, satisfaction for the offence; and if the Nation refuses to constrain its own subject to make such satisfaction, it takes upon itself the responsibility of his acts, and makes itself an accessory to the wrong which he has committed. An injured Nation is

Reprisals.

under such circumstances justified in seizing both the persons and the property of the subjects of the other Nation, with a view to keep them as pledges until it has obtained satisfaction; or even, in the case of property, to apply it at once in satisfaction of the debt, or in compensation for the injury[30].

Embargo.

§ 12. *Embargo* is one of the modes of proceeding which a Nation may adopt with a view to obtain satisfaction for a debt or an injury. The term is borrowed from the Spanish Law-procedure, and signifies *arrest* or *sequestration;* and it is applied to the seizure or detention of persons or property, which happen to be within the territory of a Nation at the time of seizure. Embargo is a term of very varied import. It is frequently used to denote the seizure of ships and cargoes in the ports of a Nation under the authority of its municipal law; and such seizures and the consequent detention are spoken of as Civil Embargoes. An International Embargo, on the other hand, is an act not of civil procedure, but of hostile detention. It may be made for the same object as Reprisals are made upon the high seas, namely, for the satisfaction of a debt, or for the redress of an injury; but it may also be made in cases where Reprisals could not justly be granted, and frequently by way of prelude to war. It is, however, not in itself an act of war, but is at first equivocal as to its effect; and if the matter in dispute ends in reconciliation, the seizure, although hostile in form, proves in substance to have been merely a temporary sequestration consistent with relations of amity. On the other hand, if the transaction ends in war, the subsequent hostilities impress a retrospective character on the Embargo, and it is to be considered a

Equivocal in character.

[30] Grotius, L. III. c. 2. § 14. Puffendorf, L. I. c. 13. § 10. Vattel, L. II. § 342.

hostile sequestration *ab initio*. The property siezed in such a case is liable to be regarded as the property of persons who were trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. Such is the necessary course, to use the language of Lord Stowell[31], if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. It may be open to question, however, whether the doctrine of *provisional Embargoes* has not been maintained by the British Prize Courts in too absolute a manner. An Embargo *by way of obtaining redress* may be justifiable, notwithstanding that the parties, whose persons and property are seized and detained, have ventured within the jurisdiction of the Nation which makes the Embargo, trusting to that security which the existing relations of peace between the two Nations warrant. If they should suffer in the result, they will suffer vicariously for the wrong which their Nation has refused to redress, and they will have no just cause of complaint except against the original wrong-doer, or their own Nation, which has failed to compel him to do justice. But an Embargo, which is made merely *in contemplation of war* under circumstances in which Reprisals could not be justly granted, cannot well be distinguished from a breach of good faith towards the parties who are the subject of it. It seems not unreasonable therefore to limit the international right of Embargo to those cases, in which it is clear that the Nation which makes the Embargo is entitled to exact satisfaction for a debt, or compensation for an injury; and in which cases the right may be lawfully exercised during that ambiguous state of things, which precedes open war. The President of the

Provisional Embargoes.

[31] The Boedes Lust, 5 Robinson, p. 246.

United States (Jefferson) thus speaks of the Embargo laid upon American vessels in British ports in 1807–8[32]: "The immediate danger we are in of a rupture with England is postponed for this year. This is effected by the Embargo, as the question was simply between this and war. That *may* go on a certain time, perhaps through the year, without the loss of their property to our citizens, but only its remaining unemployed in their hands. A time would come, however, when war would be preferable to the continuance of the Embargo."

Reprisals.

§ 13. *Reprisals* is a term derived from the old French word *Reprisalles*, which is found in documents of the fourteenth century, as for instance, under the antique form of *Reprisalx*, in an English Statute, 17 Edw. III. st. 2. c. 17. (anno 1355), and likewise in a treaty between England and France, of 7th of May, 1360[33]. The Latin forms *Repræsalia* or *Repressaliæ*, the latter of which is adopted by Bynkershoek, do not appear to have been familiar to Grotius, as he uses the word *pignoratio*, which is borrowed from the Civil Law of Rome; but the word *Repreysalliæ* occurs in an ancient Aragonese Charter[34], of a date as early as anno 1326, so that we may be satisfied that the International remedy for Wrong, which the word Reprisals denoted, was in general practice in Europe during the early part of the fourteenth century. The practice of Reprisals seems to have been the complete form of the exercise of the Right of Redress, which had been termed as early as the twelfth century the practice of Marque. The word Marque, which is of French origin, has been identified by some authors with the German

Practice of Marque.

[32] Letter to Charles Pinckney, March 30, 1808. Jefferson's Correspondence, Vol. IV. p. 114.

[33] Dumont, Traités, Tom. II. Pt. I. p. 16.

[34] Ducange, Vox *Marcha*. (4.)

"Mark," or the Latin Marcha, in the sense of a boundary; and Letters of Marque have been accordingly interpreted to mean Letters of Licence granted by a Sovereign Prince to his subjects to cross the frontier of his territory with the object of attacking a neighbouring Prince or his subjects. By other authors the phrase Letters of Marque has been held to mean Licences from an Independent Prince to set a mark upon, or to seize as a pledge, the goods of others. There is no doubt that the verb *Marcare*, or *Marchiare*, is used in documents of the thirteenth century in a sense akin to that of the pure Latin word *pignorare*. A Charter granted anno 1283, by Peter (III.) the Great, of Aragon, to the citizens of Barcelona, forbids any provisions imported into the city of Barcelona by sea or land from being arrested or taken in pledge. Victualia quæ apportantur in Barcinona per mare vel per terram . . . non *marcentur* neque pignorentur . . . tam pro alienis debitis quam pro propriis[35]. So, likewise, the Council of Marciac[36], in France, in the next century (anno 1326), enacted that, Personæ Ecclesiasticæ vel earum bona pro aliis non *marchientur* vel pignorentur. (Cap. LIV.)

The analogy of the Roman Civil Law, which authorised a creditor in certain cases to proceed summarily against his debtor per pignoris capionem[37], in other words, to seize any property belonging to his debtor as a pledge for the payment of his debt, suggests rather that the original meaning of the word *marcare*, in connection with the *jus marcandi*, Droit de Marque, was that of arresting and sequestrating goods or property, and in this sense we find Letters of *Contremarque* issued by Sovereign Princes to their subjects, authorising them

Letters of Contremarque.

[35] Ducange, Glossarium, Vox *Marcare*.

[36] Labbei Concilia, Tom. XI. Par. II. p. 1767.

[37] Gaii Institut. L. IV. c. 26.

in their turn to seize the goods of those who had taken from them their goods under the authority of Letters of Marque.

§ 14. The granting of Letters of Marque by Sovereign Princes to the commanders of private ships, armed and equipped for maritime warfare at the expense of their owners, although it may now be regarded as an institution of a barbarous age, which ought to be allowed to fall into desuetude, was nevertheless the first systematic attempt to regulate private warfare on the high seas, and thereby paved the way for its abolition. During that long period of anarchy, which prevailed on the high seas after the breaking up of the Roman Empire, merchants had been compelled to form themselves into voluntary associations for mutual defence against lawless sea-rovers, and thus it happened, that the police of the high seas came to be administered by voluntary associations. These bodies were accustomed to exact redress without waiting for any authority of Princes, not merely in behalf of the members of such associations, but also in behalf of other honest merchants, who had been despoiled of their goods by pirates, or had otherwise suffered violence on the high seas in the pursuit of their lawful calling. Besides these associations for mutual defence, other associations were organised in the great commercial cities of the Mediterranean, for the express purpose of making war against pirates, and articles of association came to be framed with a view to regulate the conduct of their expeditions, and the distribution of the booty captured from the enemy. There is extant a very ancient body of Regulations, for the Government of cruisers fitted out by voluntary associations of the above character, which are printed in most of the Editions of the Italian version of the Book of the Consulate of the Sea imme-

Growth of the Admiralty Jurisdiction.

diately at the end of the "Good Customs of the Sea." In the Venetian editions, these regulations[37] have their chapters numbered consecutively, as if they were a continuation of the Customs of the Sea. They are, however, altogether distinct in their origin, and form a separate treatise in the earliest MSS[38]. M. Pardessus has very judiciously separated these regulations from the Customs of the Sea, and has published them apart, under their proper title of "Chapitres sur les Armemens en Course," as forming part of the Usages of the Kingdom of Aragon in matters of Maritime Prize[39]. From these regulations it would appear that these private Societies of cruisers, or to call them by their Italian name *corsari*, were allowed to appropriate to themselves the property which they had captured at sea, without the authority of a Commission from any Sovereign Prince, and without any necessity of bringing in their prizes for adjudication before disposing of them. It would not be unreasonable to suppose that this general licence of cruising against pirates, styled *la guerra del corso*, would degenerate in course of time into something very much akin to the evil practices which it was intended to suppress, and that it would become necessary for Sovereign Princes to regulate in its turn the practice of cruising (la course). We accordingly find Ordinances issued by Sovereign Princes,

Armemens en Course.

[37] In the Venetian edition of the "Consolato del Mare," printed in 1549, which was the first to obtain circulation in the North of Europe, these regulations form chapters 298–334, in continuation of the Customs of the Sea.

[38] These MSS. are in the Bibliothèque Nationale in Paris. They are in the Catalan language, and are distinguished by the press marks Espagnol 124, and Espagnol 56. They have been lately collated by the author, who has published the Catalan text of the Customs of the Sea, accompanied by an English translation, in the appendix to the Black Book of the Admiralty, Vol. III. p. 50.

[39] Lois Maritimes, Tom. V. p. 396.

upon consultation with the Councils of Commerce (les prud-hommes de mer), for regulating the practice of cruising, and after the Admiralty Jurisdiction came to be exercised by Sovereign Princes, measures were taken by them to put an end to the system of private warfare on the high seas, by stipulating with one another that their subjects should not be allowed to make war without an authority to that effect from their respective Sovereigns. It would seem that, in the thirteenth century[40], Sovereign Princes had begun to forbid their subjects to cruise against the subjects of other Princes without their authority; but it was not before the fourteenth century that any mention of Letters of Marque occurs in Public Treaties, or that it came to be thought obligatory upon private cruisers to provide themselves with an authority from a Sovereign Prince in the form of Letters of Marque, or of Letters of Reprisals.

§ 15. When an injury has been committed by the subjects of an Independent Prince upon the subjects of another Independent Prince, and the former has plainly refused, or unreasonably delayed, to procure redress to be made by the offending parties, the latter, in virtue of his obligation to protect his subjects, is warranted in authorising them to make Reprisals[41] upon the offending parties and their fellow-subjects, for their fellow-subjects accept the responsibility of the acts of the offending parties by

Grant of Reprisals.

[40] Thus King Edward I. of England says, in a letter of the year 1295, "Bernardus nobis supplicavit, ut nos sibi licentiam *marcandi* homines et subditos de regno Portugalliæ et bona eorum per terram et mare, ubicunque eos et bona eorum invenire possit, concederemus, quousque de sibi ablatis integram habuisset restitutionem." Rymer, Fœdera, T. II. p. 69.

[41] The Law and Custom of Nations in respect of Reprisals is very lucidly set forth in a Report (Oct. 11, 1650) made by the Judge of the High Court of Admiralty of England to the Council of State. Thurlow's State Papers, Vol. I. p. 264.

supporting the Sovereign Power of their State in its refusal or delay to procure redress. It is not an unreasonable view of the origin of this practice of Reprisals, which refers it to the inability of Independent Princes, in the infancy of international life, to induce their more powerful subjects to make redress for wrong done by them to the subjects of other Independent Princes; as in such cases Princes would be likely to prefer that the injured parties should exact redress for themselves, rather than they should have to turn their arms against their own subjects to compel them to make such redress.

The employment of force by an Independent Prince, for the purpose of making Reprisals against the subjects of another Independent Prince, has accordingly been held to be compatible with the maintenance of general pacific relations between the two Nations. Bynkershoek observes that Reprisals[42] have only place in time of peace. Reprisals are for the most part resorted to for the purpose of redressing a wrong inflicted upon an individual, after he has ineffectually demanded justice from the Sovereign Power of the Nation, of which the wrong-doer is a member. Under such circumstances, everything that belongs to the Nation is subject to Reprisals, wherever it can be taken, provided that it is not a deposit entrusted to the public faith[43]; for as a Nation has control over the latter only in consequence of that implicit confidence, which the owner of the deposit has placed in its good faith, it ought to respect it as sacred even in the case of open war. But as between Nations, the property of individuals is regarded as belonging to the Nation at large, of which they are members. Accordingly the private property of every individual

Reprisals consistent with Peace.

[42] Repressaliis locum non esse nisi in pace. Bynkershoek, Quæst. Juris Publici, c. 24.

[43] Vattel, L. II. c. 18. § 344.

member of a Nation is liable to Reprisals in redress for wrong inflicted upon a member of another Nation. Further, it is only from the Sovereign Power of a Nation, that authority is rightfully derived to make Reprisals upon the private property of the members of another Nation. Vattel holds that when Reprisals have been made, it is the duty of the Sovereign to compel those of his subjects who by their conduct have given occasion for just Reprisals, to compensate those upon whom the Reprisals have fallen, and so to take care that the property of innocent persons be not made answerable for the obligations of others. For although the Sovereign, by refusing or delaying to do justice, may have brought on Reprisals against his own subjects, those who were the final cause of them do not become less guilty, and the fault of their Sovereign does not exempt them from repairing the consequences of their own offence.

§ 16. Jurists, who confine the use of the term *Retorsion* to remedies for departures from Comity, have divided Reprisals into *negative* and *positive* Reprisals, according as they are instituted by reason of the refusal of a Right or the infliction of an Injury. According to this nomenclature which Klüber appears to have introduced, and which is adopted by Mr. Wheaton[44] and Dr. Phillimore, negative Reprisals take place when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another Nation to enjoy a right which it claims. Positive Reprisals, on the other hand, take place when a State seizes persons and effects belonging to another Nation, in order to obtain satisfaction for a wrong or an injury. Heffter, on the other hand, following Grotius, De Wolff, and Vattel, limits the term Reprisals to acts of force, to which a Nation has recourse in order to obtain satis-

Negative and positive Reprisals.

[44] Wheaton, Elements, P. IV. c. 1. § 2. Phillimore, Vol. III. § 12.

faction for wrong or injury done to itself or its subjects, and according to this view, those acts which are termed *Negative* Reprisals are more properly classed under the head of Retorsion. If we look to the etymology of the words Retorsion and Reprisals, Heffter appears to have reason on his side. The sense, which ancient usage has attached to the term Letters of Reprisals, coincides with the etymology of the word, besides whenever Reprisals are spoken of in Treaties, there is no doubt that acts of forcible seizure are in the contemplation of the framers of those Treaties.

Special Reprisals.

§ 17. A more substantial and less technical division of Reprisals is that which is founded upon the extent to which a Sovereign Power permits them to proceed. Reprisals are *Special*, when a Sovereign Prince grants Letters of Reprisals and Marque to certain of his Subjects, who have suffered wrong from the Subjects of another Sovereign Prince, for which they have in vain demanded justice. Such Reprisals are held in practice to be perfectly consistent with a state of amity between Nations, and they are identical with the Reprisals of the fourteenth century, by which private war was reduced to a certain order, and the way was paved for its extinction by subjecting it to the control of Sovereign Princes.

General Reprisals.

General Reprisals, on the other hand, is a general permission given by a Sovereign Power to its Subjects to seize the persons and property of the Subjects of another Power. It is immaterial in what manner such Reprisals are executed, whether by the commissioned ships of the Crown, or by the armed ships of its Subjects at large under Letters of Marque and Reprisals from the Crown, so long as General Reprisals are ordered by the Sovereign Power to be made against the persons and property of the Subjects of another Power. Several writers, following the sup-

posed authority of the Grand Pensionary De Witt, approve his remark, as if it was of general application, that "he saw no difference between General Reprisals and Open War[45]." There is however an important difference between them, and it would appear that those writers who have supposed themselves to be countenanced by the Grand Pensionary of the States General, have not sufficiently kept in view the occasion of his remark. It appears that England had laid an Embargo in 1662 upon all Dutch vessels in British ports in favour of the Knights of Malta, in reprisal for the detention by the Dutch of certain property belonging to the Knights, and that the States General[46] remonstrated against Reprisals being made by a Sovereign Prince in behalf of foreigners, not his subjects, as being contrary to the practice of Nations. England on this occasion acquiesced in the justice of the Dutch remonstrance, and directed the Embargo to be raised. On this occasion the Grand Pensionary remarked that he saw no difference between General Reprisals and Open War; and it may well be, that such a general sequestration of Dutch vessels in British ports, if not warranted by the Law of Nations, could only be regarded as an act of Open War against the States General. But an order for General Reprisals seems to be distinguishable in the practice of Nations from a declaration of war in this respect, that a State of Peace is not terminated by an order for General Reprisals in the same manner, as it

De Witt.

[45] This remark of the Grand Pensionary is cited in a note to a passage in Vattel, L. II. c. 18. § 346. Several writers have referred to it, as if it were a statement of the customary law of Europe, which Vattel himself had adopted in the very words of the Grand Pensionary. But the note is not found in the original edition of Vattel's work: it is added for the first time in the edition of 1797, which was published after Vattel's death.

[46] Bynkershoek, De Foro Legatorum, c. 22.

is terminated by a declaration of war. There is still a *locus pœnitentiæ* open to a Nation, against which General Reprisals have been declared and have even begun to be enforced; and until it resents an act of General Reprisals, there is no war. If a Nation declares war against another Nation, it renounces all its treaties of friendship and alliance with it, and there is an end to all international amity towards its subjects. Thus it was contemplated by President Jefferson[47] in 1808, that recourse should be had by the United States of America to General Reprisals against the Continental System of the Emperor Napoleon, on the assumption that a repeal of the edicts issued by the Emperor and by the President of the United States respectively would at once revive relations of peace without the delay and ceremonies of a treaty. Jefferson, it is true, speaks of the relations which would exist between France and the United States under a system of General Reprisals as relations between belligerents; but so in a certain sense are Special Reprisals, being acts of forcible seizure for the attainment of right, which are not altogether consistent in theory with perfect peace between Nations, yet in practice they are held to be exceptional measures consistent with amity, and which do not give rise to a State of War[48]. The more correct view seems to be, that General Reprisals *per se* are not inconsistent with a State of Peace, although they may

[47] "Perhaps the advocates of the second (war) may to a formal declaration of war prefer general letters of Mark and Reprisal, because on repeal of their edicts by the belligerents, a revocation of the letters of Mark restores peace without the delay, difficulties, and ceremonies of a treaty." Letter of Jefferson to Lt. Governor Lincoln, Washington, Nov. 13, 1808. Jefferson's Correspondence, 8vo. Lond. 1829, Vol. IV. p. 119.

[48] Letters of Marque and Reprisal are mentioned in the 9th of the Articles of Confederation of the United States (anno 1781) as issuing in time of peace.

be in certain cases a preliminary step towards a public war. According to present usage, they are in the nature of a conditional declaration of war, which, however, may still be averted by an offer of satisfaction from the offending State. Chief Justice Hale, in his Pleas of the Crown (Vol. I. p. 162, 3), says, that "General Marque or Reprisal doth not make the two Nations in a perfect state of hostility between them, though they mutually take from one another, as enemies, and many times, in process of time, these General Reprisals grow into a very formal war: and this was the condition of the war between us and the Dutch 22 Feb. anno 1664, the first beginning whereof was by that Act of Council, which instituted only a kind of universal Reprisal, and there were particular reasons of State for it, but in process of time it grew into a very war, and that without any war solemnly denounced." Thus General Letters of Marque and Reprisal were issued by England against Spain on 10 July, 1739, by reason of Spain exercising a right of search over English vessels beyond the limits of her jurisdictional waters on the coast of South America. The Ambassadors of both Powers, notwithstanding this, remained at their respective posts. Spain in return issued Letters of Reprisal on 20th July, 1739, and it was not until two months had expired after the English Letters of Reprisal had been issued, that the Ambassadors of the two Nations left the Courts to which they had been respectively accredited. War was formally declared by England on 19th October, 1739.

Conditional declaration of war.

Reprisals against Spain in 1739.

§ 18. That General Reprisals are distinct in character from War, and are not attended with that interruption of all friendly relations which War entails, may be inferred from the proceedings which took place in 1839–40, between her Britannic Majesty's Govern-

Reprisals against the Two Sicilies in 1839.

ment and the Government of the King of the Two Sicilies, in reference to the Sulphur Monopoly in Sicily, which had been granted by the Crown of Naples to a Company of French Merchants (Messrs. Taix, Aycard, and C^ie.) The British Government held that the grant made to the French Company was a breach of the Treaty of Commerce of 1816 between Great Britain and the Two Sicilies. On this occasion, after the British Minister at Naples had formally demanded the revocation of the grant made to the French Company, and the Neapolitan Government had declined to comply with this demand, orders from the British Government were transmitted to the Admiral of the British fleet in the Mediterranean Sea "to cause all Neapolitan and Sicilian ships which he might meet with either in the Neapolitan or Sicilian waters to be seized and detained, until such time as notice should be received from her Majesty's Minister at Naples that the just demand of her Britannic Majesty's Government had been complied with." Lord Palmerston, then Secretary of State for Foreign Affairs, upon the announcement that the British Admiral was proceeding to carry out his instructions, sent a despatch[49] to the British Minister at Naples (April 14, 1840), in which he observes, that "as the Reprisals, which Sir Robert Stopford has been instructed to make, *do not*, however, *constitute war*, it is not the wish of Her Majesty's Government that you should follow up those steps by quitting Naples. If indeed the Neapolitan Government were to add to the injustice, which it has committed towards British subjects in regard to the Sulphur Monopoly, by any acts of violence towards British subjects or property, you would in such case leave Naples, and retire to

[49] British and Foreign State Papers, 1840, 41, p. 202.

Rome, there to await further instructions." On 17th April the British fleet began to make Reprisals in the vicinity of Naples, and captured a number of Neapolitan vessels. An Embargo was at the same time laid in the ports of Malta on all vessels that bore the Sicilian flag[50]. Naples, on the other hand, made preparations for defence; and the Neapolitan Government laid an Embargo[51] on all British vessels in Neapolitan and Sicilian ports. Everything appeared to be tending to open war, when the Cabinet of the Tuileries offered its mediation, and the King of the Two Sicilies accepted it (26 April, 1840). Reprisals thereupon ceased to be made on either side; the Neapolitan Government agreed to dissolve its contract with the French Company, and the vessels seized by the British fleet by way of Reprisals were restored to their Neapolitan owners without the general relations of peace between the two Nations having suffered any such interruption, which required that they should be renewed by any formal Treaty of Peace between the two Nations.

Reprisals not always lawful.

§ 19. Although General Reprisals do not necessarily put an end to all relations of amity, and so far are means for procuring international redress short of actual war, there are cases in which it would not be lawful to use Reprisals by way of prelude to war, and in which a proclamation of General Reprisals would be equivalent to a proclamation of War. To such cases the observation of the Grand Pensionary De Witt[52] is justly applicable, when he remarked, that he saw no distinction between the General Reprisals made by the British Government and open War. Acts of Reprisal as distinguished from acts of

[50] Annual Register, 1840, p. 219.

[51] Annuaire Historique Universel, 1840, p. 48.

[52] Letter to the King in Council, Oct. 8, 1675.

War are only allowed by the Law of Nations, when there has been a denial of justice to a well-founded claim, or such a delay as is inconsistent with an honest intention to do justice. "Reprisals," says Sir Leoline Jenkins[53], "will not lie where there is neither denial of justice, nor a delay amounting to denial." "Reprisals," writes Grotius, "are a species of violent execution, which takes place when Right is denied[54]." "Reprisals," says Bynkershoek[55], "are not to be granted except upon an open denial of justice." "It is only for an evidently just cause," writes Vattel[56], "and for a clear and undeniable debt, that the Law of Nations allows us to make Reprisals; for he who advances a doubtful claim cannot in the first instance demand anything more than a fair examination of his right. In the next place, before he proceed to such extremities, he should be able to show that he has ineffectually demanded justice, or at least that he has every reason to think that it would be in vain for him to demand it. Then alone does it become lawful for him to take the matter into his own hands, and to do himself justice."

Sir Leoline Jenkins.

Grotius.

Bynkershoek.

Vattel.

International justice may be denied in several ways, (1) by the refusal of a Nation either to entertain the complaint at all or to allow the right to be established before its ordinary tribunals, (2) or by studied delays and impediments, for which no good reason can be given, and which in effect are equivalent to a refusal, (3) or by an evidently unjust and partial decision[57]. But if a court of competent

[53] Sir Leoline Jenkins's Works, Vol. II. p. 778.

[54] Locum autem habet, ut aiunt juris consulti, ubi jus denegatur. Grotius de Jure B. et P., L. III. c. 2. § 14.

[55] Quæstiones Juris Publici, L. I. c. 24.

[56] Law of Nations, L. II. c. 18. § 343.

[57] Vattel, L. II. c. 18. § 350.

jurisdiction should pass an erroneous judgment in a doubtful question in which a foreigner is a party, such a result would give no right of Reprisals to the Nation to which the foreigner belongs, if the judges have been left free, and have given sentence according to their conscience. Upon doubtful questions, different men think and judge differently; and all that a foreigner can desire is, that justice should be as impartially administered to him as it is to the subjects of the Prince, in whose courts the matter is tried. Grotius observes, that "in a doubtful case the presumption is always in favour of the established judges, and that Reprisals are permitted by custom only, where judgment is given plainly against Right[58]."

Reprisals against persons.

§ 20. Reprisals by the custom of Nations extend to persons as well as to property. Reprisals against persons known by the Greek name *ἀνδροληψία*, or the seizure of persons, are recognised by Grotius, Vattel, Bynkershoek, and all modern writers; but under the practice of the Christian Nations of Europe this form of Reprisals is seldom resorted to, except with a view to obtain satisfaction for the unjust seizure or detention of other persons. Thus in 1740[59] the Empress Catherine of Russia having arrested the Baron de Stackelberg, who was a natural born subject of Russia but had acquired a Prussian domicil and was in the military service of Prussia, the King of Prussia made reprisal by seizing two Russian subjects, and detained them until the Baron de Stackelberg was liberated. Whenever persons are thus seized by way of reprisal, they are entitled to be treated as hostages, whose lives are sacred, and who

[58] De Jure Belli, L. III. c. 2. § 5.

[59] Moser, Versuch, VIII. 504.

are entitled to good treatment[60]. A Sovereign has no right to put to death the subjects of a State which has done him an injury, except when they are engaged in actual war against him. By the Law of Nations all the subjects of an offending Power, whether they are natural born subjects or persons who have acquired a *domicil* in his territory by long residence therein, are liable in their persons and their property to the operation of Reprisals made against that Power; but individuals who may be only temporarily resident in the country, or travelling through it, do not thereby incur any liability to Reprisals[61]; for the liability to undergo Reprisals is as it were a liability to share the burden of a public debt, to which those are not liable who are only subject to the laws of a country for a time.

Political Envoys exempt from Reprisals.

Political Envoys, although they may be permanently resident in a country, are equally exempt from the operation of Reprisals. They cannot be the subjects of Reprisals, either in their persons or in their property, on the part of the Nation which has received them in the character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection; on the other hand, they cannot be the subjects of Reprisals on the part of another Nation, which may be entitled to make Reprisals on the Sovereign to whom they are accredited, as they are not *domiciled* within his territory. Grotius appears to consider that Political Envoys who are on their way to our enemies, and come *within our territory* without having first obtained letters of safe conduct, may be seized by way of reprisal[62]. The meaning of Grotius is not alto-

Grotius.

[60] Vattel, L. II. c. 18. § 351.

[61] Grotius, de Jure Belli, L. III. c. 2. § 7.

[62] A numero tamen subditorum jure gentium excipiuntur

gether clear, and several writers have objected to such an interpretation of the passage, but as Grotius elsewhere[63] says that if Political Envoys (legati) presume to pass without a safe conduct through the territory of a Power to which they are not accredited, and are going to its enemies, or coming from its enemies, or in any other way take part with its enemies, they may be lawfully killed, there is no difficulty in supposing that he means to lay it down, that a mission to or from an enemy will expose a Political Envoy, whilst he is *in transitu* through the territory of a belligerent Power, to the operation of reprisals on the part of that Power. Thus the Duc de Belleisle, having incautiously entered the Hanoverian territory on his way to St. Petersburg, as ambassador from the King of France, who was at that time at war with Hanover and Great Britain, was arrested with his suite by the Hanoverian Government, and sent to England as a prisoner of State[64]. It is quite another thing, observes Grotius, if any Prince shall *out of his own territory* contrive to surprise the Ambassadors of another State, for this would be a direct breach of the Law of Nations[65]. The case of the seizure of the Envoys of the Confederate States of America on their way to Europe on board the British Post Office Packet, the Trent, by an United States cruiser, would seem to come within the prohibition

Duc de Belleisle.

The British Packet Trent.

legati non ad hostes nostros missi, et res eorum. De Jure Belli, L. III. c. 2. § 7.

[63] Non pertinet ergo hæc lex ad eos per quorum fines, non accepta venia, transeunt legati; nam siquidem ad hostes eorum eunt, aut ab hostibus veniunt, aut alioqui hostilia moliuntur, interfici etiam poterunt. De Jure Belli, L. II. c. 18. § 5.

[64] Martens, Causes célèbres du Droit des Gens, Tom. I. p. 285.

[65] Aliud sit si quis extra fines suos insidias ponit legatis alienis, eo enim jus gentium violaretur. Et hoc continetur in Thessalorum oratione contra Philippum apud Livium (L. XXXIX. c. 25). Grotius de Jure Belli et Pacis in notis suis ad L. II. 118. § v. 2.

laid down by Grotius. Their seizure was justly resented by Great Britain as a direct breach of the Law of Nations, and the Envoys, at the demand of the British Government, were set at liberty by the Government of the United States, and allowed to proceed to Europe in a British vessel.

Institution of Letters of Marque.

§ 21. It has been observed that the institution[66] of Letters of Marque and Reprisal was the first systematic step in controlling private warfare, and in restraining individuals from disturbing the public peace at their own discretion. The Right of Marque, as a prerogative of Sovereign Power, is mentioned in Letters Patent and Diplomas of the twelfth century[67], in which the Sovereign grants to certain of his subjects the Right of Marque against others of his subjects, in other words, grants to them permission to seize the persons and goods of others of his subjects, against whom they have made complaint. In the thirteenth century we find Sovereign Princes granting Marque to their subjects against the subjects of other Sovereign Princes. In the fourteenth century[68] Municipal Laws were passed in various countries, prohibiting individual citizens from making Reprisals without having previously obtained Letters of Marque from a Sovereign Prince. In the fifteenth century[69] Treaties of Peace occur frequently, in which there are stipulations that all ships, which should go out of port, should give security not to make Reprisals; other treaties also occur in this century, in which the Contracting Parties undertake not to grant Reprisals

[66] Ducange, Glossarium, Vox *Marcha*.

[67] Rymer, Fœdera, Tom. II. p. 691. Letter of King Edward I. of England.

[68] 27 Edw. III. St. 2. c. 17. anno 1359.

[69] Treaties between France and England, anno 1440, Dumont, T. III. pars i. p. 548; between Spain and England, anno 1489, Dumont, T. II. pars ii. p. 219.

to their subjects at all, unless they should have first addressed a complaint to the Sovereign, from whose subjects they have received injury, and have been refused redress[70]. In the sixteenth century we find it stipulated in various treaties of commerce that neither party shall grant Letters of Marque or Reprisal against any others than the principal delinquents and their goods, and only for manifest delay or denial of justice[71]. In the seventeenth century treaties for the first time appear, in which it is agreed that no Reprisals shall be granted on either side, but that prompt justice shall be administered[72]. These treaties however are exceptional, as it was stipulated in most treaties of this period, that if justice were not done within a definite period, as for instance, three, four, or six months, Reprisals should be allowed. In the eighteenth century we find a great number of treaties, providing that the goods of the subjects of either party, which may lie within the territory of the other party, shall be exempt from seizure for Reprisals, except on account of the debt or crime of the owner[73]. It has been the crowning work of the Congress of Paris, in the nineteenth century, to abolish the practice of Sovereign Princes issuing Letters of Marque, as far as the Nations which are parties to the Declaration of Paris are concerned, the first Article of which declares that

Regulations of Practices of Marque by Treaties.

Renunciation of Marque by Congress of Paris in 1856.

[70] Treaty between France and Spain, anno 1489, Dumont, T. IV. pars ii. p. 11.

[71] Treaty between France and England, anno 1510, Dumont, T. IV. pars i. p. 126.

[72] Treaty between England and Denmark, anno 1621, Dumont, T. V. pars ii. p. 393.

[73] Treaties between France and the United Provinces, anno 1739; France and Denmark, anno 1742; Sweden and the United States, anno 1783; Prussia and the United States, anno 1785; Austria and Russia, anno 1785; England and France, anno 1786; France and Russia, anno 1787; Russia and Portugal, anno 1787.

"La Course est et demeure abolie[74]." The effect of this Declaration will be examined in a subsequent chapter, in which La Course, or the use of Privateers, will be more fully discussed.

[74] Martens, N. R. Gén. XV. p. 768.

CHAPTER II.

WAR AND ITS CHARACTERISTICS.

War as defined by Grotius—Bynkershoek's definition—War the contention of independent political communities in the prosecution of Right—View of Grotius as to Private Warfare—Albericus Gentilis—War a necessary Alternative—Lord Bacon's view of War as the highest trial of Right—Grotius—Private Peace inconsistent with Public War—Lawful recourse to War—Offensive and Defensive War—Vattel—Grotius—Formal Declaration of War—Law of the Germanic Empire in the Twelfth Century—Law of Europe in the Fourteenth Century—Declaration of War by Heralds-at-Arms—Proclamation of War at home by Heralds—No British Declaration of War by a Herald since Queen Mary's reign—Last occasion of a Declaration of War by a Herald-at-Arms in 1657, at Copenhagen—Printed Declarations of War in the reign of Charles II—Manifestoes of War to Neutral Nations—Recall of resident Envoys—Disuse of formal Declarations of War—Last occasion of a formal Declaration of War by Great Britain in 1762—Letter of Lord Chancellor Thurlow in 1778—Object of Proclamations of War at home—Object of Manifestoes to Neutral Powers—Opinion of M. de Hautefeuille as to the necessity of a Declaration of War—A State of War *de facto*—Texas and Mexico—Burlamaqui's opinion—Practice of the United States of America—The maintenance of the Status ante bellum conditional—Unilateral Declaration of War sanctions reciprocal hostilities—Recall or Dismissal of resident Envoys—Treaties—Ignorance of hostilities on the part of Neutrals.

War as defined by Grotius.

§ 22. WAR has been defined by Grotius, at the outset of his work, to be the State or Condition of parties contending by force, as such. "Status per vim certantium quâ tales sunt." Under this large

acceptation of the term "War" Grotius comprises every species of contention by force, not even excluding single combats, which he regards as forms of private war, and which, as being more ancient than public wars, and of a common nature, he considers should be classed under the same general head[1]. In adopting this terminology, Grotius admits that the term War had, prior to his time, been used for the most part to denote public as distinguished from private contentions by force, which he accounts for on the ground that the more eminent *species* frequently usurps to itself the name of its *genus*. He assigns, at the same time, as his reason for not including *justice* in his definition of war, that the object of his enquiry was to determine whether any war can be just, and if so, what may be called a just war; and it was therefore necessary for him to distinguish the subject *War* from the question which he proposed to examine respecting it.

Bynkershoek's definition.

§ 23. Bynkershoek has objected to the definition, which Grotius has adopted, as imperfect, although he agrees with him in considering war to be the State or Condition of parties in contention, as distinguished from an act of contention, or the contest itself. He proposes what he conceives to be a more complete definition, when he says that war is a contention, by way of force or deceit, of independent parties in the prosecution of their right. "Bellum est eorum, qui suæ potestatis sunt, juris sui persequendi causa concertatio per vim vel dolum[2]." In adopting this definition, Bynkershoek admits that war may exist between individual men equally as between States, but only in the case where such individual men are *suæ potestatis*, in other words, acknowledge no political superior. He

[1] De Jure Belli et Pacis, L. I. c. 1. § 11.

[2] Observationes Juris Publici, L. I. c. 1.

rejects altogether the notion of private war, as a distinct species of war, even in theory, seeing that the word *private* implies a political body, of which the parties in contention are respectively members and are accordingly, as such, not *suæ potestatis*. War therefore, according to Bynkershoek, is properly predicated only of contentions by force or deceit between parties which acknowledge no political Superior, and which cannot therefore have recourse to a common judge, in other words, between independent political bodies; for the individual man, living in a state of solitude, is an ideal person, of whom no counterpart is found in real life. Further, Bynkershoek defines the object of all war to be the prosecution of Right, either in the way of self-defence or of self-redress, and in this respect his definition is in harmony with the more complete idea of war, of which Grotius has given an outline in his preliminary chapter, when he says that no war ought to be undertaken except for the obtaining of Right, nor, when undertaken, ought it to be carried on beyond the bounds of Right and Good Faith[3].

War the contention of Independent Political Communities.

§ 24. The more important distinction between the definitions, which Grotius and Bynkershoek have respectively adopted, consists in the limitation of the term *War*, on the part of the latter writer, to the contention of parties who are *suæ potestatis*. War, regarded as the subject of rights and obligations, is not only such in reference to the belligerent Nations themselves, but also in reference to other Nations which take no part in the actual contention, but are said to be *neutrarum partium*. A state of War, when it exists between two Nations, gives to such Nations special rights, as Belligerents, both in regard

[3] Prolegomena, § 26.

to each other, and likewise in regard to Neutral Nations, which do not exist during a state of Peace. It would seem unreasonable therefore to hold that whilst two independent political communities are at peace with one another, and with all other independent political communities, any individual members of either community can be at war with one another, and thereby give rise to special rights and obligations on the part of the communities of which they are respectively members, both in regard to each other, and in regard to other political communities, which will be foreign to the general relations of peace which exist amongst the communities themselves. War, therefore, as the subject of special rights between the belligerent parties and likewise between the belligerent parties and neutrals, must be distinguished from War in the more extensive sense in which Grotius employs the term at the outset of his work, namely, as denoting every sort of contention by force, in contrast with a judicial proceeding.

View of Grotius as to Private War.

"Undoubtedly," says Grotius, "the liberty of Private Warfare, which existed before judicial tribunals were established, has become much restricted, yet there are cases in which that liberty still exists, namely, wherever judicial tribunals are wanting; for the law, which forbids a person to obtain that which is his right in any other way than by a judicial proceeding, ought to be equitably understood, as applying only to those cases in which there is access to a judicial tribunal." Now a judicial tribunal may be wanting either for the moment or permanently. It is wanting for the moment, as happens on all those occasions, when a judge cannot be waited for without certain danger or loss; it is permanently wanting, either *de jure*, as if a person be in an unoccupied place, as for instance, on the high seas, in a desert, or on an unin-

habited island, or in any other place where there is no established civil society; or *de facto*, as when the subject members of a civil society will not submit to the judge, or the judge openly refuses to take cognisance of the matters in dispute.[4]

In all these cases Grotius holds that the liberty of Private Warfare still exists. It is not necessary to enquire whether there is, in fact, such an analogy between the cases in which individuals prosecute their Right by force in the absence of a judicial tribunal, and the cases in which a political community prosecutes its Right by force, as to warrant Grotius in classing them under the same generic head. It will be sufficient to bear in mind the more extensive sense in which Grotius uses the term War, and to remember that the ideas, which it expresses in his system, correspond to that more extensive use of the term. This circumstance will account for the conclusions of Grotius being occasionally at variance with those of other writers, who limit the term War to the contention of communities, which acknowledge no political superior.

§ 25. It may well be the case that Grotius, in maintaining the liberty of Private Warfare, and in seeking to subject it to rules analogous to those which should govern Public War, was in advance of the practice of the age in which he lived, and of which he speaks in strong terms of abhorrence, as exhibiting "a license in making war, of which even barbarian nations might be ashamed, recourse being had to arms for slight reasons, or for no reasons at all; which being once taken up, there was no longer any reverence for Right, either divine or human, just as if men had been let loose to commit all sorts of

[4] De Jure Belli et Pacis, L. I. c. 3. § 11.

crime without restraint." But the Universal Society of Nations has happily made considerable progress since the age of Grotius, and in the interval much, which was repugnant to its true nature, has been slowly but steadily eliminated from its practice. If the case may still perchance occur, in which individual men have no other resource, in order to prevent injury or grievous loss being inflicted upon them by others, than to use force, such use of force is not held to give rise to a state of War either between the parties themselves, or the independent political communities of which they are members. The acts of the individuals must be authorised by the Sovereign power of the States, of which they are subjects or citizens, before they can be held to give rise to a state of War. In vain would independent political communities agree that all disputes between their respective members shall be settled by amicable discussion, if individuals were at liberty to contest with one another their mutual rights by force. War, therefore, in the sense in which its rights and obligations are the subject of Public Law, has no place between private persons. "Bellum est armorum publicorum justa contentio[5]." The employment of force in the prosecution of Right within the territory of a Nation may be a lawful act on the part of individuals, if it be sanctioned by the Law of the territory: if, on the other hand, it be not so sanctioned, it will be a trespass against the peace of the Nation to which the territory belongs, and will be punishable as such by the Sovereign Authority of the State, without any disturbance of the peace of other Nations. The employment of force, on the other hand, in the prosecution of Right, in a place which does not belong

Albericus Gentilis.

[5] Albericus Gentilis de Jure Belli, L. I. c. 11.

exclusively to any Nation, but to which all Nations have an equal right of access, will only be a lawful act on the part of individuals, if it be authorised by the common Law of Nations; for no Nation can claim of Right to enforce its territorial Law, to the exclusion of all other Law, in a place over which it has not an exclusive right of sovereignty. In a place therefore which is *publici juris*, if the employment of force by private persons be not authorised by the public Law of Nations, it will be a trespass against the general peace of Nations, and will be justiciable as such by all Nations. In order therefore that the employment of force by individuals beyond the limits of the territory of the Nation, of which they are citizens, should have any countenance of Public Law, their acts must be clothed with a certain public character, which can be imparted to them only by the authority of the State of which they are citizens. The use of force under such authority by private persons may justly be regarded as the act of the Nation itself; and the parties against whom that force is exercised will have the right of treating it as an act of War, which they may resent if they please, according to the rules which govern the disputes of Nations by arms.

War a necessary alternative.

§ 26. War then may be regarded as an alternative state of international relations, which supersedes the relations of Peace, whenever Nations prosecute their Right by force. It is impossible that differences should not arise between Nations upon questions of Right amidst the complicated relations of international society; and whenever such differences arise, the particular question of Right, which is at the foundation of them, must be decided in favour of the one or the other Nation, in order that the controversy may be appeased, and the interchange of good offices

between them, which is the true end of international society, may be resumed. In every civil society, tribunals have been set up, before which disputes between individual citizens as to their respective rights may be submitted to the arbitrament of reason; and if the party who has been adjudged before any such tribunal to have done wrong, should thereupon not redress such wrong, the united force of all the members of the civil society to which he belongs, which is termed the Sovereign Power of the civil society by reason of the authority, which directs the action of the united force of all its members, being concentrated in the person of a supreme Chief, will compel the wrong-doer to make redress. But the obligations of Natural Society which are enforced by the Sovereign Power of a State in the case of Civil Society, although they are equally binding in International Society, cannot be enforced by any analogous supreme authority. When a question of Right is in controversy between Nations, there is no supreme Chief to whose hands the direction of the united force of all Nations has been intrusted, and who would be enabled thereby to enforce the decree of any tribunal, to which the question of controverted Right might be referred. But the differences, to which the question of disputed Right will have given origin, must suspend of necessity the peaceable intercourse of Nations; for Nations, in respect of their intercourse, are Peers or Equals; and no Nation can continue to hold intercourse with another Nation under the sense of that inequality, which is implied by submitting voluntarily to Wrong. Hence it becomes a requirement of International Society, that every question of Right between Nations should be adjusted, so as not to derogate from their equality as Peers. In the absence of all other means of adjust-

ment, every Nation falls back upon the united force of all its members, and endeavours to enforce what it conceives to be Right, by the exertion of that force against the wrong-doer. War is thus undertaken by a Nation from necessity, when Right cannot be obtained by a judicial proceeding. "Ex necessitate introductum bellum, quæ est, quia inter summos principes populosque liberos judicium civile et inermis disceptatio esse non potest, qui judicem scilicet non habent et superiorem; unde meritoque summi sunt, et publicorum appellationem merentur soli, cum minores omnes loco privatorum censeantur[5]."

Lord Bacon's view of War.

§ 27. Lord Bacon[6] has adopted a similar view of the nature of what is rightly termed War, when he speaks of Wars as being "the highest trials of Right, when Princes and States, that acknowledge no superior upon earth, shall put themselves upon the justice of God for the deciding of their controversies by such success, as it shall please Him to give on either side. And as in the process of particular pleas between private men all things ought to be ordered by the rules of Civil Laws, so in the proceeding of War nothing ought to be done against the Law of Nature or the Law of Honour." In other words, nothing should be attempted in war which is contrary to the practice of civilized nations, or contrary to good faith. That there is a practice of Nations in matters of war to which all Nations are expected to conform themselves[7], is an axiom of those tribunals which take

[5] Albericus Gentilis de Jure Belli Comment. I., who says further, "Et hinc fit, ut bellum non sit, ubi ea cessat necessitas ad Martem judicem recurrendi; cessat autem semper, si principes inferiores præliantur aut populi subditi; immo crimen hi læsæ majestatis patrant, si bellum gerunt."

[6] Observations on a Libel, Tom. V. p. 384, Basil Montague's edit.

[7] The Hurtige Hane 3 Ch. Rob. p. 326.

Grotius.

special cognisance of the incidents of international life in time of war. "Let it be granted," says Grotius, "that Laws must be silent in the midst of arms, provided they are only those laws which are civil and judicial, and proper for times of war; but not those which are of perpetual obligation, and are equally suited to all times: for it was very well said by Dion Prusæensis, "that between enemies written, that is, civil laws are of no force; but unwritten laws are in force, that is, such laws as Nature dictates, or the consent of Nations has instituted[8]."

Private Peace inconsistent with Public War.

§ 28. Private War being thus inconsistent with Public Peace, it follows that Private Peace is equally inconsistent with Public War. Peace may be defined to be that state or condition of things, in which men adjust their differences on questions of Right by Reason. It would be an error to suppose that the absence of all differences on the subject of Right is the true test of that state or condition of international relations, which is termed Peace, as contrasted with War. Differences as to mutual Right must arise in the most elementary stages of human society; for the fundamental condition of Natural Society is, that each individual member of a community shall do for the other members everything which their welfare requires, and which he can perform, without neglecting the duty which he owes to himself. Social Right accordingly consists in the correct adjustment of the balance of duty between a man and his neighbour, in other words, between men living in society. When men unite themselves in Civil Society, the adjustment of the balance of duty between a man and his neighbour, when they differ as to their respective obligations, is ascertained by

[8] De Jure Belli et Pacis, Prolegomena, § 27.

discussion before a third party, who is authorised by the Sovereign power of the civil community to decide all differences between its members, and may invoke the aid of the whole community to carry his decision into effect. When Nations, however, unite themselves in International Society, the adjustment of the balance of duty between them respectively, when they differ, cannot be effected by discussion before a common judge; for the community of Nations has never yet consented to authorise any international tribunal to decide such differences, and to invoke the aid of the whole community to carry its decisions into effect. In the absence of any common judge or arbiter between the members of different Nations, a citizen of one Nation, who conceives himself wrongfully prejudiced by the conduct of the citizen of another Nation, has no other resource than to invoke the aid of the entire Nation, of which he is a member, to enforce an adjustment of the balance of duty between him and the wrong-doer. The only mode, whereby that adjustment can be effected against the will of the wrong-doer, is by setting in motion against the Nation itself, of which the wrong-doer is a member, the united force of all the members of the political community of which the party wronged is a member, in order to constrain the former to exert its sovereign power over the wrong-doer, and compel him to make redress. It is the exercise of the united force of all the members of an independent political community for this object, which is properly termed War in the juridical sense of the term. "Cum sint duo genera decertandi, unum per disceptationem, alterum per vim, cumque illud proprium sit hominis, hoc belluarum, confugiendum est ad posterius, si uti non licet superiori. Quare suscipienda quidem bella sunt ob eam causam, ut sine injuria in pace

vivatur[9]." It is the paramount duty of every independent political community to protect its members from suffering wrong, either at the hands of other members of the same community, or at the hands of members of other communities; and as it is a maxim of political law that no citizen can stand aloof and claim to be *neutrarum partium* in cases of civil tumult, so it is, by parity of reasoning, an axiom of international law, that no member of an independent political community can be at peace with any member of another independent political community, when the communities themselves are at war. For an individual citizen to stand aloof, when the united force of all the members of a political community is to be put forth against the members of another political community, would be to betray a primary duty of Civil Society, which is constituted after the fashion of a State, with the express design of the Sovereign Power enforcing the co-operation of all its subjects, at the proper times and places, in the business of mutual assistance and mutual defence.

Lawful recourse to War.

§ 29. An appeal to the united force of all the members of a political community to procure Right to be done to one of its members on the part of a member of another political community, in other words a recourse to War, becomes lawful only when it becomes necessary[10], and it becomes necessary only when amicable negotiation has been tried and failed, or when it is morally certain to fail, if it should be tried, or when it cannot be tried without certain danger. According to the Fetial Law of the Romans no war was just which had not been preceded either

[9] Cic. Off. L. I. c. 11.

[10] Justum est bellum quibus necessarium, et pia arma, quibus nulla nisi in armis relinquitur spes. Livii Hist. L. IX. c. 1.

by a formal demand of redress, or by declaration and proclamation of war. "Ex quo intelligi potest, nullum bellum esse justum, nisi quod aut rebus repetitis geratur, aut denuntiatum ante sit et indictum[11]." A Nation may with good cause have recourse to war, either to procure reparation for injury done, or to obtain security against injury threatened; in other words, a Nation may lawfully make war upon another Nation, which has violated or threatened to violate its rights. But if a Nation takes up arms, when she has not received any injury nor is menaced with any injury, she has recourse to force without lawful cause. When an injury has been inflicted upon a Nation, it is right that reparation should be made to it, if the injury be of a nature to be repaired, or in case that the mischief resulting from it be irreparable, then that compensation should be made, and further that securities should be taken by the Nation, that the injury should not be repeated. Again, if an injury should be threatened, it is right that a Nation should protect itself and take securities for its future safety. Hence arises a distinction between wars which are made to redress injury, and wars which are undertaken to prevent injury. When war is undertaken to enforce the reparation of an injury, and to exact satisfaction for it, it is termed an offensive war; when it is undertaken to repel actual or threatened attack, it is called a defensive war. The latter, however, is not necessarily a just war; for if a Nation, which wages an offensive war, has justice on its side, its adversary has no right to make forcible opposition; and a defensive war will be in such a case an unjust war, for it is an act of injustice to resist any person, who is asserting a lawful

[11] Cic. Off. L. I. c. 11.

right[12]. But if the Nation, which has been originally in the wrong, offers to make restitution or reasonable satisfaction, and the other Nation is not content to accept it, the balance of right will incline in favour of the Nation which has offered satisfaction, and a defensive war on its part will be a just war.

Offensive and defensive War.

§ 30. The distinction between an offensive and a defensive war in the sense in which these terms are employed by Wolff and Vattel, is not unimportant in its bearings upon the question, whether a Nation may have recourse to arms in the prosecution of Right against another Nation without previous notice.

Vattel.

"War," says Vattel[13], "is either offensive or defensive. The Power, which takes up arms to repel the attack of an enemy, carries on a defensive war; the Power, which is first to take up arms and attack a Nation which is living at peace with it, wages an offensive war. The object of a defensive war is simple; it is self-defence. The object of an offensive war varies with the various affairs of Nations, but in general it has regard either to the prosecution of right, or to security. In the case of a defensive war, when a Nation takes up arms to repel attack, the reason of the thing dispenses with any previous notice."

Grotius.

"By the Law of Nature," writes Grotius, "where either force is repelled by force, or punishment is inflicted upon him who is the offender, there no denunciation is required." It is otherwise, however, in the case of an offensive war. "But as often," continues Grotius, "as one thing is to be taken for another, or the goods of a debtor to be seized for a debt, a formal demand is requisite, and still more

[12] Klüber, § 235, founds his distinction between a defensive and an offensive war on the circumstance of its justice or injustice.

[13] Droit des Gens. L. III. c. 1. § 5. Wolff. Jus Gentium, § 615.

when the goods of those who are the subjects of the debtor are to be seized; so that it may be evident that we can obtain our own, or what is due to us, in no other way[14]." For this right of so seizing is not a primary right, but a secondary and substitutive right. And in like manner before he, who has the supreme Power, be attacked for the debts or offences of his subjects, there ought to be interposed a formal demand which may put him in the wrong, so that he may be rightly deemed to be the cause of the damage, or to be responsible for it." In all such cases, in order to work the peculiar effects, which are legally incidental to a State of War, a declaration is required, if not on both sides, at least on one side, as a preliminary to actual hostilities[15]. The practice of Nations appears to have been in accordance with the views of Grotius as late as the middle of the seventeenth century.

Formal Declaration of War.

§ 31. The formal mode of declaring war, as established in Europe in the twelfth century, was by Letters[16] of Defiance, under the Seal of the Sovereign Power who declared war, and which were delivered by a messenger[17] into the hands of the Sovereign

[14] Naturali jure, ubi aut vis illata arcetur, aut ab eo ipso qui deliquit pœna deposcitur, nulla requiritur denuntiatio. At quoties pro re unâ res alia, aut pro debito res debitoris invaditur, multoque magis si res eorum, qui debitori subditi sunt, occupare quis velit, interpellatio requiritur, quâ constet alio modo fieri nequire, ut nostrum aut nobis debitum consequamur. De Jure B. et P. L. III. c. 3. § vi. 1 & 2.

[15] Cæterum jure Gentium ad effectus illos peculiares omnibus casibus requiritur denuntiatio, non utrinque, sed ab alterâ partium. Ibid.

[16] Litteræ diffidationis—Lettres de deffyance.—A very early form of such a letter (annò 1427) is given in Leibnitzii Codex Jur. Gent. p. 348, in which Amadæus Duke of Savoy, announces to Philip Duke of Milan, his intention "cum amicis nostris prosilire, ut dum licet valeamus, Altissimo concedente, conspiratis injuriis obviare." The reply of the Duke of Milan is annexed.

[17] The Declaration of War on the part of Charles V of France against Edward III of England

Power against whom war was declared. The practice of declaring war by heralds and pursuivants-at-arms, which prevailed in the fifteenth and sixteenth centuries, has been considered by some writers[18] to have had its origin in the magnanimity of Knightly Honour, rather than in consideration of Order and Right, and to be one of the instances of the improvement, which the Law of Nations derived from the institutions of Chivalry. It seems, however, probable, that the custom itself of formally declaring war, as a preliminary step before recourse could be had to actual hostilities, did not originate in any voluntary impulse of high chivalric feeling, but was either a tradition of the ancient Fetial Law of the Romans, which survived the fusion of Roman and Barbaric institutions, or was founded on an institution of the early Germanic tribes[19], and had acquired the character of Law throughout the Germanic Empire of the Romans in the time of the Emperor Frederic Barbarossa. (Anno 1152–1190.) The Peace of the Empire (Land-Friede), which was established by a constitution of that Emperor, made in the Diet of Nürnberg (anno 1187), reserved to every one the right to do justice to himself, provided only that he gave three days' notice to his adversary. It was one great object of this constitution to check the practice of private warfare amongst the Princes of the Germanic Empire, and to modify its

Law of the Germanic Empire in Twelfth Century.

was delivered by a valet of the French King's household into the hands of the English King, in his Council Chamber. The latter expressed surprise at so mean a messenger being the bearer of the letter; saying that it ought to have been sent "by a prelate, or a valiant baron, or knight," and at first doubted its genuineness; but after examining the seal pronounced it to be genuine, and made preparations for war. Froissart Chronicles, I. c. 250.

[18] Ward on the Law of Nations, Vol. II. p. 207.

[19] Turpinus in Carolo Magno, c. 17. Talis erat inter eos institutio, quod, si aliquis treugam datam ante diffidentiam frangeret, statim interficeretur. Ducange, vox *Diffidare.*

evils by regulating its commencement. The same Emperor had been powerful enough to abrogate the right of private warfare altogether amongst the cities and nobles of the Kingdom of Italy at the Diet of Roncaglia (anno 1158), and he was so firmly resolved[20] to uphold the practice of giving notice to an adversary before commencing war, as essential to good faith, that he sent a messenger to Saladin the Great to demand satisfaction from him for the injuries which he had inflicted on the Christian community, and in case of refusal to declare war formally against him. We find the rule of giving three days' notice of intended hostilities maintained in a still more peremptory manner in the thirteenth century by the Golden Bull[21] of the Emperor Charles IV, (anno 1356,) which regulated the manner of commencing war amongst the German Princes, and which provided that no one should on any pretext invade his neighbour, unless he had given him three days' personal notice beforehand, or had publicly signified his intention to make war against him at the place of his usual residence in the presence of competent witnesses. From these and other instances, which occur in French and Spanish Annals[22], there can be no doubt that in the fourteenth century it was the established Law of Europe, that an offensive war could not be rightfully commenced without a previous declaration of hostilities.

Law of Europe in the Fourteenth Century.

[20] Et quia imperialis majestas neminem citra defectionem impetit, sed hostibus suis bella semper indicit, destinatus ab Imperatore ad Saladinum nuntius, ut vel Christianorum universitati, quam læsit, satisfaciat in plenum, vel diffiduciatus se præparet ad bellum. Auctor. Hist. Hierosolym, anno 1177.

[21] C. 18. De Diffidationibus.

[22] Diffidamento non præcedente legitimo et forali, regulariter nullus potest in Arragonia alium damnificare, capere, aut occidere, vel castrum ejus per vim et foriam occupare: alias incurrit pœnam traditionis. Mich. del Molino, Repertorium.

§ 32. The primary object of a formal Declaration of War was to notify to a party the intention of his adversary to prosecute his right by force[23]. But after war came to be exclusively a trial of Right between Nations, in which Sovereign Princes alone could take the initiative, and in which the whole body of their subjects was bound to array itself in arms against the adverse Nation, it became necessary for Sovereign Princes to notify by a Proclamation to their subjects the cessation of peace, and the existence of a state of war with all its legal consequences. The form and manner of declaring war abroad, as well as of proclaiming war at home, was, no doubt, influenced in some degree by the institutions of Chivalry; and the Herald of the middle ages came to discharge functions analogous to those, which were assigned to the Fetial of Ancient Rome, as the messenger of peace and war. We find accordingly that the most solemn mode of declaring war in the fifteenth and sixteenth centuries was by a herald-at-arms. Thus Garter King-of-Arms was sent by King Edward IV to Louis XI of France with a letter written in such fine language and style, that, according to Philippe de Commines, it could not have been written by an English hand[24]. The Registers of the Heralds' College in London contain numerous entries of similar missions on the part of Garter, or Clarencieux, or Norroy King-of-Arms. The functions of the Herald, however, were not confined to the business of declaring war abroad. The commencement of war was generally proclaimed

Declaration of War by Heralds-at-Arms.

Proclamation of War at home.

[23] Sed ut justum hoc significatu bellum sit, non sufficit inter summas utrinque potestates geri; sed oportet, ut audivimus, ut et publice decretum sit et quidem ita decretum publice, ut ejus rei significatio ab altera partium alteri facta sit. Grotius, L. III. c. 3. § 5.

[24] Memoires of Philippe de Commines, L. IV. c. 4.

by heralds-at-arms on behalf of the Sovereign Prince to his subjects. Thus we find it recorded by Hollinshed, on the occasion of Queen Mary declaring war against Henry II of France by a herald-at-arms, that the war was brought to the knowledge of the English Nation by a proclamation of an equally solemn character. "In this season," (anno 1557,) writes the chronicler[25], "although the French King (as was said) was verie loth to have warres with England, yet the Queene (Mary) tangling herself contrarie to promise in her husband's quarrel, sent a defiance to the French King by Clarencieux King-of-armes; who comming to the citie of Remes, where the said King then laie, declared the same unto him the seventh of June, being the Mondaie in Whitsun-weeke. On the which daie, Carter and Norreie King-of-armes, accompanied with other heralds, and also the lord maire and certeine of the aldermen of the citie of London, by sound of three trumpets that rode before them, proclaimed open war against the said King, first in Cheapeside, and after in other parts of the citie, where customarilie such proclamations are made: the sheriffes still riding with the heralds till they had made an end, although the lord maior brake off in Cheapeside and went to St. Peter's to hear service, and after to Paules, where (according to the usage then) he went in procession." This record of the double fact of a Declaration of War abroad and of a Proclamation of War at home is the more curious, as it seems to have been the last occasion of any English Sovereign declaring war by a herald-at-arms.

Last British Declaration of War by a Herald-at-Arms.

There was no Declaration of War in the reign of Queen Elizabeth, on the occasion of the Expedition

[25] Hollinshed Chronicles, Vol. IV. p. 87.

of the Spanish Armada, although there was a State of War after that event between England and Spain. So likewise in the reign of Charles I, Lord Clarendon[26] narrates how Villars, Duke of Buckingham, "made war upon France without any colour of reason, or so much as the formality of a Declaration from the King, containing the ground and provocation and end of it, according to custom and obligation in the like cases, for it was observed that the Manifesto, which was published, was in the Duke's own name, who went admiral and general of the Expedition."

Last Declaration of War by a Herald-at Arms in 1657.

The practice, however, of declaring war by a herald-at-arms had not entirely passed away on the continent of Europe in the early part of the seventeenth century; for we find it told by the historian of the reign of Louis XIV, that Louis XIII still clung to the ancient rule, and sent a herald-at-arms to Brussels, in 1635, to declare war against Spain[27]. This is cited by many writers as the last known instance of the kind; but there appears to have been one later instance in 1657, when Sweden declared war against Denmark[28] by a herald-at-arms sent to Copenhagen.

Printed Declarations of War in the reign of Charles II.

§ 33. It appears from a passage in Chief-Justice Hale's "Pleas of the Crown[29]", that in the reign of Charles II the solemn form of declaring war then in use was by a printed declaration, such as that monarch issued against the Dutch in 1671. The institution of permanent embassies resident in the capital cities of Europe, which dates from the ministry of Cardinal Richelieu, could not but

[26] Clarendon's History, Vol. I. p. 71. ed. Oxford 1826.

[27] Voltaire Siécle de Louis XIV. c. 11.

[28] Marten's Précis, L. VIII. § 267. Holberg Danmarks Rige's Hist. Tom. III. p. 241.

[29] Pleas of the Crown. I. p. 162.

tend very much to modify the earlier forms of international intercourse, more particularly in regard to the course of proceedings introductory to war. Further, during the Thirty Years' War, the Law of Nations underwent a rapid development, for the stormy conflicts resulting from the union of religious with political antipathies consequent on the Reformation, and which had been confined in the sixteenth century to single states, convulsed the entire political system of Europe in the seventeenth century, and the Northern Powers of Europe came to take a part in the disputes of Central and Southern Europe. War, therefore, whenever it broke forth, was attended by more general consequences; and hence it became expedient for Nations which were about to become belligerents to give notice of their intention to other Nations, so that the latter might, if they did not side with either party, know from what period they should observe the duties of neutrality. Hence originated a practice for belligerent Nations[30] to issue Manifestoes to other Nations, to make known the fact that they have taken up arms. Grotius speaks of this as an established practice in his time; and Vattel considers that a belligerent Power is bound to publish a Manifesto to neutral Powers, in order to obviate all difficulties that may otherwise arise from the subjects of the latter Powers carrying to a belligerent any supplies in the nature of contraband of war[31], and so incurring the penalty of their confiscation, if they should be captured by the adverse belligerent.

Manifestoes of War to Neutral Nations.

[30] Et has ob causas solent a bellum gerentibus publicæ significationes fieri ad alios populos, tum ut de jure causæ, tum etiam ut de spe probabili juris exequendi appareat. Grotius, L. III. c. 1. § v. 4.

[31] L. III. c. 2. § 64.

§ 34. It is usual for a Nation which contemplates the necessity of making war upon another Nation to apprise the other Nation of its sense of an injury having been inflicted upon it or of a right having been denied to it through the medium of its Resident Envoy; and if no satisfaction should be offered, to recall its Resident Mission. This step, however, although it may imply the cessation of friendly relations, does not necessarily constitute a state of war between two Nations[32]. A Nation may even go further, and authorise reprisals to be made against another Nation; and if no other step should be taken on either side, the persons and property seized by way of reprisals may be detained as pledges for satisfaction without any war necessarily resulting thereupon. Thus, in 1739, on occasion of Spain having failed to pay a sum of money within a certain time specified in a treaty between the Crowns of Spain and of England, the King of England granted letters of marque and reprisal against Spain, and Mr. Keene, the British Minister at Madrid, was instructed to declare to the Court of Spain that his master, although he had permitted his subjects to make reprisals, would not be understood to have broken the peace, and that this permission would be recalled as soon as his Catholic Majesty should be disposed to make the satisfaction which had been so justly demanded. His Catholic Majesty, however, having ordered all the British ships in the harbour of Spain to be seized and detained, the King of England would keep measures with him no longer, but denounced war against him[33].

Recall of Resident Envoys.

[32] Thus France and Great Britain recalled their Diplomatic Envoys from Naples in 1859, but war did not thereupon ensue.

[33] Smollett's History of England, Vol. III. p. 27.

In such a case as this, a right of hostilities, as between the two Nations, accrued to England at once upon the original breach of a treaty on the part of Spain; but the exercise of that right was suspended[34]. The character of the acts of reprisal continued to be ambiguous, until war was declared. After war had been once declared, it reflected back upon the original breach of a treaty an undoubted character of hostility, and the property seized by way of reprisal became subject to condemnation, as the property of enemies *ab initio*[35].

Disuse of Formal Declarations of War.

§ 35. It may be taken to be the established practice of European Nations, since the Peace of Paris (anno 1763), to dispense with any formal Declaration of War between the parties, and to attach all the legitimate consequences of war to a state of hostilities which has been duly recognised and explicitly announced by a domestic Manifesto or State paper. The last occasion on which England had recourse to a formal Declaration of War was on 2 January 1762, when she declared war against Spain, and by that Declaration authorised and required all the King's subjects to do and execute acts of hostility against the King of Spain, his vassals and subjects, while she also advertised all

[34] From a letter addressed by Lord Chancellor Thurlow to the King's Advocate General, on 12 December 1778, a MS. copy of which is in the author's possession, it appears that there had been six declarations of war on the part of the King of England since the Revolution of 1688; namely, that of 7 May 1689, against France; 4 May 1702, against France and Spain; 16 Dec. 1718, against Spain; 19 October 1739, against Spain; 17 May 1756, against France; 2 May 1762, against Spain.

[35] Upon this principle England refused to restore to France at the Peace of Paris (anno 1763) the captures made by her fleets before the declaration of war in 1756, on the ground that the right of hostilities did not result from a formal declaration of war, but from the hostilities which the aggressor first offered. Ann. Register, anno 1760, p. 263.

other persons, of what Nation soever, not to transport or carry any soldiers, arms, powder, ammunition, or other contraband goods, to any of the territories or dependencies of the King of Spain. On the occasion of the next following war between England and France, in 1778, the first public act of the British Government was to recall its ambassador from Paris, and to lay an embargo upon all French vessels in British ports, immediately upon receiving a declaration[36] in writing from the French ambassador in London, that the French King had entered into a treaty of friendship and commerce with the United States of North America, "as a body of States, which had been in the full possession of independence since 4 July 1776," and that he was prepared to maintain effectively his treaty rights and the honour of his flag. France thereupon recalled her ambassador from the Court of St. James, and the French Mediterranean fleet having sailed to North America, a series of engagements took place between French and English vessels, although no Declaration of War had been issued on either side. Meanwhile the British Channel Fleet, under Admiral Keppel, came into collision with some French frigates, and the two Nations drifted into open war. The occasion of this war was somewhat exceptional, being the first instance of an Established Power recognising formally the independence of the revolted subjects of another Established Power, with which it was at peace, and at the same time, when it announced its recognition of their independence, declaring that

[36] This Declaration of 15 March 1778 was delivered by the Marquis de Noailles, the Ambassador of France in London, to Lord Weymouth, the British Secretary of State for Foreign Affairs. It will be found in the Nouvelles Causes Célèbres du Droit des Gens, par le Baron Ch. de Martens, Tom. I. p. 406.

it had entered into a treaty of friendship and commerce with them, and was determined effectively to protect its subjects in the enjoyment of their treaty privileges. England, under these circumstances, considered that the conduct of the French King was not merely an act of aggression against her, but a violation of the Law of Nations; and consequently that she was entitled to resent it, and make prize of French vessels, without any necessity of formally declaring war against France. That the British Government so determined to act after mature deliberation may be gathered from a letter of Lord Chancellor Thurlow's[37], in which he discusses the precedents of a Declaration of War. "I find a doubt hath been started whether it be correct to make prize or to condemn it as confiscate, and still more to distribute it to the captors, before a Declaration of War. Upon the last it is insisted, that the goods of Nations, not declared Enemies, can at most be taken as Reprisal, and detained only as pledges for satisfaction. It is said that this was done in 1754, and that no Prizes were actually condemned or distributed before Declaration of War at that period. Declaration is said to be necessary to what writers call a Solemn War, but it has been the practice of Nations in all ages to begin hostilities otherwise. What the Supreme Power of any other country may do, the King here has been in the use of doing in the matter of War against strange Nations. Therefore if you could, without trouble to yourself, order a search, I should be extremely

Letter of Lord Chancellor Thurlow, in 1778.

[37] Letter of Lord Chancellor Thurlow to Philip Stephens, Esq. Secretary of the Admiralty, dated 12 August 1778, a copy of which exists in a MS. volume in the possession of the author, and formerly belonging to Sir James Marriott, the King's Advocate General.

happy to find what the course has been especially since the Revolution in this respect, in giving orders to King's ships to take prizes, in granting commissions to Privateers, Letters of Marque and Reprisal, in proclaiming such purposes, in distributing Prizes to Captors, antecedent to Declaration of War."

Object of Proclamations of War at home.

§ 36. The object of a Proclamation of War, in the sense in which that expression is used to signify a public announcement of hostilities on the part of a Sovereign Power for the information and direction of its Subjects, as distinguished from a direct notification of hostilities made to the State against which war is to be carried on, is to fix the date from which special duties attach to the Subjects of the belligerent Power as regards the Enemy. After war has been proclaimed, no pacific relations of whatever nature can be entertained between the respective Subjects of the belligerent Powers, except under license or convention. All trade is suspended, no contracts are legal, no debts can be enforced, and no suits can be sustained by or against an enemy before the municipal tribunals of either State. Ex natura belli commercia inter hostes cessare non est dubitandum, is the language of Bynkershoek[38], and Valin treats it as a question beyond all dispute in his time. But there is no absolute necessity that there should have been a Proclamation of War in order to establish the legal quality of alien enemy against a Subject of a Foreign Power. In the reign of Queen Elizabeth it was held to be sufficient to show that there was a State of War in fact between the Crown of England and Spain, and that the Spaniards were actual enemies of the Queen,

[38] Quæst. Jur. Publici, L. I. c. 11.

in order to disable a Spanish Subject from suing a British Subject in a British court in an action of debt. So likewise in France it was ruled by a court of competent jurisdiction, on 13 May 1757, that there was a State of War between France and England on 29 October 1755, by reason of the acts of hostility committed by English cruisers against French vessels, although war was not declared by England before 17 May 1756[39]. So likewise the war between the United States of America and Mexico, in 1846, was commenced by a conflict of armed forces in the disputed territory, and without any declaration on either side; and the Congress of the United States passed an Act subsequently recognising the existence of the war[40]. A State of War may thus exist between two countries as respects the mutual rights and obligations of the citizens of each country in relation to one another, without any proclamation or indication thereof, or other formal matter of record to prove its commencement.

§ 37. It has been observed that the right of hostilities, as between two belligerent Nations, does not result from any formal Declaration of War, but from the aggression of one Nation upon the independence of the other. The obligation of neutrality, on the other hand, as between the respective belligerents and other Nations, does not arise, except upon notification from one or other belligerent that he is at war with his adversary. A Nation is bound to bring to the knowledge of other Nations, with which it is at amity, the fact of its being obliged to take up arms to maintain its rights against

[39] Hale's Pleas of the Crown, I. p. 162. Valin, Commentaire sur l'Ordonnance de la Marine, L. III. Tit. VI. § 3. p. 457. Ed. 1829.

[40] Halleck's International Law. San Francisco, 1861. p. 354.

another Nation, so that they may take measures to warn their citizens to observe the duties of neutrality. For this purpose Manifestoes are usually published by the belligerent Powers at the commencement of the war, which set forth the grounds upon which they feel justified in taking up arms. After that a Manifesto, which always implies, if it does not in terms contain, a declaration of war, has been circulated by the diplomatic Envoys of the belligerent State at the Courts of the various Neutral Powers, it will be no longer competent for the Subjects of those Powers to plead their ignorance of a State of War between the belligerents. A Manifesto may be regarded as an Appeal or Protest addressed by an injured Nation[41] to the Community of Nations. It ought to set forth in dignified language the cause of complaint and the efforts to obtain redress;—it should speak with a certain reserve of the injuries which the Nation has undergone, and with a certain moderation of the satisfaction which it seeks for such injuries. It ought to set forth the facts without colour or animosity, and state the principles of Public Law upon which it relies to maintain the justice of its cause. It should speak with respect of its adversary as its equal; and should avoid embittering the dispute by offensive expressions. In a word, it should avow regret that ancient friends should have become temporary adversaries, and express a hope of a sincere reconciliation after the

Object of Manifestoes to Neutral Powers.

[41] An "Exposé des motifs," or a "Mémoire Justificatif," as the case may be, is sometimes published; but this is a totally distinct paper from a Manifesto. The French Government published a paper under the former title in 1779, to which the English Government published an answer under the latter title from the pen of the historian Gibbon. They will be found in Ch. de Martens, Nouvelles Causes Célèbres du Droit des Gens, I. p. 425 & 436.

dispute has been adjusted. "The Homeric heroes," says Vattel, "called each other before battle 'dog' and 'drunkard.'" The Emperors and Popes of the middle ages treated each other with as little delicacy. But we may congratulate our age on the superior gentleness and humanity of its manners, and not treat as vain politeness those courtesies, which are productive of real and substantial effects[42].

Opinion of M. de Haute-feuille.

§ 38. Amongst modern publicists M. de Haute-feuille[43] stands alone in maintaining that war is not *regularly* commenced as regards the adverse Nation, except after a direct Declaration of War, although it may be *regularly* commenced in regard to Nations, which do not take part in the hostilities, after the diplomatic circulation of a Manifesto. He admits that Vattel and De Rayneval, who have maintained the necessity of a Declaration as contrasted with the looser doctrines of Bynkershoek, Klüber, and De Martens, allow that the diplomatic circulation of a Manifesto is in effect equivalent to a direct Declaration of War; but he persists in holding that war, and more particularly a maritime war, requires to be legalised by a special Declaration made to the adversary. Let it be considered for a moment to what conclusions this position leads. If the character of all acts committed before a Declaration of War is to be measured by the same standard which applies to a state of Peace, then acts of violence committed under such circumstances on the high seas will be acts of piracy, and those who have committed them may be treated as *hostes humani generis;* but no Courts of Admiralty in any country have ever ventured to pronounce the acts of parties, who are belligerents *de facto* before a Declaration of War, to be piratical acts. Further,

[42] Heffter, § 121.

[43] Des Droits et des Devoirs des Nations Neutres, Tit. III. c. 1. § 11. p. 139. ed. 1858.

A State of War *de facto*.

where there is a State of War *de facto* between parties, which cannot be preceded by a Declaration, as for instance in the extreme case of a Civil War, where part of a Nation has erected a distinct and separate government, the existence of a State of War, under such circumstances, is of necessity recognised by foreign Powers, although they may not have acknowledged the political independence of the new Government; and foreign Courts administering the Law of Nations have uniformly treated each party as a belligerent, in reference to all acts asserted by it to have been done *jure belli*. Thus the existence of a civil war between the people of Texas and the authorities and people of the other Mexican States was recognised by the President of the United States, in the month of November, 1835. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican Government; and when the armed schooner Invincible, sailing under the flag of the newly constituted Republic of Texas, captured in the month of April 1836 the American brig Packet, on the alleged ground that she was laden with a cargo contraband of war, destined for the use of the Mexican army, the Attorney General of the United States formally advised the President, that the charge of Piracy against the crew of the Texian brig could not be sustained[44].

Texas and Mexico.

Burlamaqui's opinion.

Burlamaqui[45], on the other hand, maintains with more reason, both as regards the real object of a Declaration of War, and as regards the actual practice of Nations, that "the formalities observed by different Nations in Declarations of War are arbitrary.

[44] Opinions of the Attorneys-General of the United States, Vol. II. p. 1066.

[45] Droit Naturel, Pt. IV. c. 4.

It is immaterial what the form may be, so that the opposing Sovereign does not remain in ignorance of it." Thus, inasmuch as according to the Constitution of the United States of America, it belongs to the province of the Legislative as distinguished from the Executive Government to declare war, a war cannot be regularly commenced by the Federal Union without an Act of Congress. The passing of such an Act by Congress is accordingly held by the United States to be a formal official notice to all the world, which is entitled to the same international respect as is paid to a Declaration of War or to a Manifesto, when it falls within the proper province of the Executive Government of a Monarchical State to issue such documents. Accordingly the United States commenced active hostilities against Great Britain in 1812[46], as soon as the Act of Congress had been passed, without waiting to communicate to the British Government any notice of its intentions, and without issuing any Manifesto setting forth the motives for commencing war.

Practice of the United States of America.

§ 39. It is undoubtedly of importance that there should be a well defined boundary line to mark the commencement of a State of War between two Nations, so that those acts which are to be considered as the effects of war may be readily distinguished from those which each Nation is entitled to regard as injuries, and for which reparation may be demanded, when terms of Peace have to be settled. But it is not always easy, as a matter of fact, to draw such a line. As long as it was the practice for a Nation to make a formal Declaration of War before commencing active hostilities, nothing was more easy than to draw a line between acts done before and acts done after the Declaration of War;

[46] Kent's Commentaries, Vol. I. § 55.

and it was not unusual to stipulate in Treaties of Peace that all places and property seized before the Declaration of War[47] should be restored. The *Status ante bellum* would, in such a case, be satisfied by returning to the state of possession before war had been declared. But after Nations came to engage in active hostilities before either of them had made any formal Declaration of War, the *Status ante bellum* would not be secured by stipulating that matters should be replaced in the state in which they were before war was declared. Thus the war between Great Britain and France, which was terminated by the Peace of Aix-la-Chapelle, may be said to have commenced with the battle of Dettingen, on 26 June 1743, which was fought between the French and English armies, the latter being commanded by the King in person, or at least by the sea fight on 9 February 1744, off Toulon, between the English fleet and the combined French and Spanish fleets. Yet no Declaration of War was made by France before 20 March 1744, nor by England until 29 March 1744, when she issued a Counter-Declaration of War. Accordingly we find that it was stipulated in the treaty of Aix-la-Chapelle[48] (18 October 1748) that "all conquests made since the *commencement of the present war*[49] shall be restored, as well in Europe as in the East and West Indies, in the state in which they are at present." Under such an agreement the *Status ante bellum* would only be satisfied by either party giving up all its conquests.

The Status ante bellum ambiguous.

[47] Ante denuntiationem belli. Treaty of Utrecht, between Great Britain and Spain, anno 1713, Art. VIII. Schmauss, Corp. Jur. Gent. Acad. p. 1421.

[48] Wenck. Codex Jur. Gent. Vol. II. p. 325.

[49] Vattel has fallen into an inaccuracy in speaking of this provision of the treaty of Aix-la-Chapelle, as if it referred to all prizes made before the declaration of war. L. III. § 56.

§ 40. When one Nation declares war against another Nation, writes Grotius, the Declaration becomes reciprocal[50]. Upon this principle Lord Stowell held that a Declaration of War on the part of Sweden against Great Britain was not a mere challenge on its part to be accepted or refused by the other country, but proved the existence of actual hostilities on one side at least, and put the other party also into a State of War, although it might think proper to act on the defensive only[51]. Cases have occurred in which a hostile demonstration has been held to amount to a virtual declaration of war, and to be a justification for having recourse to arms without any formal Declaration of War.

Unilateral Declaration of War sanctions reciprocal hostilities.

Such seems to have been the justification under which the British fleet, commanded by Admiral Byng, on 11 August 1718, destroyed the Spanish fleet at Passaro. The English ambassador at Madrid had previously warned the Spanish Prime Minister, Cardinal Alberoni, that if the threatened invasion of Sicily was not abandoned, England would oppose Spain with all her power, and had communicated to him the orders, which the English Admiral had received, to hinder and obstruct the invasion. Alberoni in reply sent a note to the effect, that the English Admiral might execute the orders which he had received from the King his master. In this case, if the English Admiral had waited for his Government to issue a formal Declaration of War, Spain would have been enabled to destroy the ally, whom the English fleet had been sent to protect. The necessity, therefore, of the case sanctioned immediate action, but the answer itself of Alberoni, in accepting

[50] L. III. c. 3. § vii. 2.

[51] The "Eliza Anne." 1 Dodson, 247. "The Nayade." 4 Robinson, p. 253.

the alternative, might be regarded as a virtual declaration of war. War was in fact commenced from the battle of Passaro, although England did not formally declare war against Spain until December 17, 1718; but when the treaty of Madrid[52] (June 31, 1721) came to be negotiated, it was provided that all the vessels and effects seized by either Spain or England, either before or after the Declaration of War, should be restored.

Recall or Dismissal of resident Envoys.

§ 41. The recall or dismissal of a resident Envoy is generally considered as equivalent to a declaration of war, although we find occasional instances where friendly relations have been suspended by that event, without war resulting therefrom. In certain treaties of commerce provision has been made that a rupture of peaceful relations shall not be held to exist, until after the recall or dismissal of the respective Envoys or Ministers of the contracting parties. Such a provision is found in the Treaty of Rio Janeiro[53], between Great Britain and Portugal; and in the Treaty of Rio Janeiro, between Great Britain and Brazil[54]; and in Treaties concluded between Brazil and France in 1826, Brazil and Prussia in 1827, and Brazil and Denmark in 1828. "If there should arise any misunderstanding, breach of friendship, or rupture, between the two Crowns (which God forbid), the rupture shall not be deemed to exist until after the recall or departure of their respective diplomatic agents," is the provision which is found in these treaties. This is a very wise and reasonable arrangement, which if it should be ever generally adopted, would prevent all

Treaties.

[52] Schmauss, Corpus Jur. Gent. Academicum, p. 2143.

[53] Treaty of Commerce between Great Britain and Portugal, 19th February 1816, Art. XXXI. Martens, N. R. III. p. 213.

[54] Treaty of 17 August 1827. Martens, N. R. VII. p. 479.

disputes and difficulties as to the true date of the legal commencement of War. As War puts an end to all amicable intercourse between the Subjects of the belligerent Powers, and abrogates all antecedent treaty engagements, it seems reasonable that its legal commencement should be marked by the formal cessation of amicable intercourse between the Governments. In the absence of any special treaty arrangements on this subject, the general rule as regards belligerents seems to be this, that a State of War may exist between them without any Declaration of War on either side. It may begin with mutual hostilities[55], and the legitimate consequences of war will ensue from the immediate commencement of such hostilities. But with regard to other Nations, they are not charged with the duties of neutrality until a State of War between the belligerents has been officially announced to them, or until they have otherwise acquired a positive knowledge of its existence. War may exist notoriously[56], in which case it is not competent for a neutral Power to refuse to recognise its existence. On the other hand, if a third party is *bonâ fide* ignorant of the existence of a war between two other parties, there is no foundation in its case for the duties, which the Law of Nations attaches to the Neutral Character, for it is unconscious that it has any occasion to act in that character. Under the circumstances of such *bonâ fide* ignorance of the existence of war between Great Britain and France, two Spanish vessels resisted the exercise of the right of visitation and search by a British cruiser[57]. Notwithstanding such resistance on

Ignorance of hostilities on the part of Neutrals.

[55] Sir W. Scott in the "Eliza Anne." 1 Dodson, p. 247.

[56] La Nuestra Senora de la Caridad. 4 Wheaton, p. 497.

[57] The San Juan Baptista and La Purissima Conception. 5 Robinson, p. 34.

their part, which is in itself an offence of a very heinous character, Lord Stowell directed the Spanish vessels to be released, on the ground that the masters of them were unconscious that they had any neutral duties to perform.

CHAPTER III.

COMMENCEMENT OF WAR.

Effect of War upon individuals—Natural born and adopted citizens—Inhibition of intercourse with the enemy—Recall of natural born subjects—Commission to carry on hostilities—Enemy-subjects within the territory of a belligerent—Treaties of Commerce—Enemy-property within the territory of a belligerent—Milder practice in modern times—Obligation of good faith—Ancient practice of Provisional Embargo—Enemy-subjects resident in the territory of a belligerent—Enemy-subjects *in transitu*—Detention of British subjects in France by the First Consul in 1803—Modern practice not to detain enemy-subjects—Debts due to enemy-subjects—Opinion of Mr. Justice Story, Mr. Chancellor Kent, Vattel, and Bynkershoek—Judgment of Lord Ellenborough, in Wolff *v.* Oxholm—Wheaton—Suspension of Commercial Contracts—Debts due to an Enemy-Sovereign—Conduct of Prussia in regard to the Silesian Loan—Conduct of Great Britain in regard to the Russian-Dutch Loan—Embargo of enemy-property afloat within the territory of a belligerent—Conduct of the Allied Powers at the commencement of the war against Russia in 1854—Russian reciprocity—Immovable property of enemy-subjects within the territory of a belligerent.

Effect of War upon individuals.

§ 42. A SOLEMN Declaration of War (*diffidatio*) purported to be a renunciation on the part of the Sovereign, who declared war, of all international obligations towards the Sovereign against whom war was declared, so that no peaceful relations of any kind could thenceforth be entertained between them, except under express convention. The existence of

mutual hostilities of such a nature, as to constitute *de facto* a State of War between two Sovereign Powers, is attended with analogous consequences in suspending all peaceful intercourse between the political communities, over which they are Sovereigns, and in constituting all the individual members of the one Nation enemies of the individual members of the other Nation. As Private War is inconsistent with Public Peace, so Private Peace cannot coexist with Public War. "In former times, and especially in small states," writes Vattel, "whenever war was declared, every man became a soldier; the entire people took up arms, and engaged in the war; after a short time a selection came to be made, and armies were formed of picked men, and the rest of the people continued to pursue their usual avocations. At present the use of regular troops is everywhere established, but principally in the great States. The Public Power raises soldiers, distributes them in different corps under the authority of chiefs and other officers, and keeps them on foot as long as it thinks necessary; as every citizen or subject is bound to serve the State, the Sovereign has a right to enroll those whom he pleases in case of necessity[1]." Accordingly as every member of a political community is under an equal obligation to serve and defend the State, as far as he is capable, no individual is exempt by the Law of Nations from taking up arms in its defence. It is, however, optional with every community to organise itself in the manner, which it thinks most convenient for its own defence in time of war. Hence the obligation of each individual member of a political community to take an active part in any war, in which the community is engaged, will depend upon the Constitutional Law of the community. Amongst some

[1] Vattel, Droit des Gens, L. II. c. 2. § 9.

nations there is a legal obligation upon every citizen under a certain age to serve the State in arms, and lot decides upon whom the actual burden of military duty shall devolve. Amongst other Nations the profession of arms is voluntary, like the profession of letters, with this difference however, that the Nation undertakes to pay those of its citizens who choose to enroll themselves in its standing army, as it is just that those who do not serve should pay their defenders. There have been on the other hand instances where Nations have been content to exempt their own citizens from active military service, and to entrust their defence to a regular army of foreign origin serving them for pay. Such were the Swiss regiments in the service of Spain and of Naples, and such were the Irish regiments in the service of the Emperor, and the Scotch regiments in the service of Sweden and of France. But in all such cases, if a soldier of foreign origin takes service in the standing army of a Nation, he becomes for the time of his service a member *de facto* of the Nation for all belligerent purposes. No person is entitled to object to his so taking service, but the Sovereign Prince to whom he owes similar service by virtue of his allegiance, as a natural born subject; and if he has entered into the military service of a foreign Power without the consent of his Sovereign, he will have offended indeed against the laws of his native country, and may disentitle himself to enjoy the privileges of a citizen, if he should return to that country. But by the Law of Nations every man is free to attach himself to any political community, which may be disposed to admit him to membership, if he finds it to be for his advantage[2]. He may make its cause his own, and espouse its quarrels;

[2] Vattel, L. III. c. 2. § 13.

but the act must be his own voluntary act. If a person accordingly voluntarily quits his native country, and seeks service with a foreign Prince, it is no violation of the Law of Nations, if the Prince should engage him in his service without the previous consent of the Sovereign, to whom he owes natural allegiance. But it would be a violation of the Law of Nations for a foreign Power to enlist soldiers within the territory of another State without the permission of the Sovereign of that State; and if at any time a foreign Power has been guilty of such an act, it has been held a sufficient cause for a declaration of war against it, unless it should have made suitable reparation.

Natural born and adopted citizens.

§ 43. When a Nation is at war with another Nation, all the members of the one Nation are the enemies of the other Nation. This rule of joint association in war applies to adopted citizens, equally as to natural born citizens. "Without doubt," says Grotius, "all the subjects of the Sovereign, from whom an injury has been received, who are such for a permanent cause, are liable to the law of reprisals, whether they be natives or citizens[3]." The same rule applies likewise to all persons who come to reside within the country of a belligerent Power with the knowledge of the existence of war, equally as to all who have come into the country before the war, and continue to reside there after the commencement of hostilities for a longer time than is necessary for their convenient departure. "Without doubt," writes Grotius[4], "strangers who come into an Enemy's country after a war has been begun and is known to exist, may be treated as enemies, and those, who have gone thither before the war has commenced, may by

[3] De Jure B. et P. L. III. c. 2. § vii. 2.

[4] De Jure B. et P. L. III. c. 4. § vi. vii.

the Law of Nations be taken for enemies after a moderate time, within which they should depart." All such persons are *de facto* subjects of the Enemy-Sovereign, being resident within his territory, and are adhering to the Enemy, so long as they remain within his territory. If they, however, quit the Enemy's territory with the intention of abandoning it, and of resuming a permanent residence in the country of their origin, they divest themselves of the enemy-character at once, upon so quitting the Enemy's territory. It is otherwise, however, with the natural born subjects of an Enemy-Sovereign; they may be treated as enemies by the other belligerent wherever he may find them, except they should be within neutral territory, in which case it is the privilege of the neutral Sovereign to prohibit all violence being offered to them. The neutral Sovereign has a right to insist that all persons within his dominions, who may have differences to settle, shall settle them in his courts by a judicial proceeding and not by violence. Thus Demophoon is represented as saying to the ambassador of Eurysthenes,

> "If you can charge these guests with an offence,
> You shall have justice, but not drag them hence[5]."

§ 44. It is customary for the Government of a country, at the commencement of a war, to issue an edict or proclamation, whereby it notifies to its Subjects the particular line of conduct, which they are to pursue in regard to the Enemy. These edicts for the most part have reference to commerce and to personal intercourse of an amicable character, which it is usual to inhibit except it be carried on under special licenses or cartels. It is competent also for a belligerent Sovereign, at the commencement of a war to recall all his natural born Subjects, who may be in the service

Inhibition of intercourse with the enemy.

[5] Euripidis Heraclidæ, 251, 252.

Recall of natural born subjects.

either of the Enemy or of any neutral Power, in order that they may take their share of duty in defending their native country. Edicts of both kinds, termed Edicta inhibitoria and Edicta avocatoria[6], were issued by the Roman Emperor of the Germans in 1792 and in 1793[7]; and a long series of Edicts of the latter kind, extending over a period of a century and a half (1548 to 1704), have been preserved in the Codex Augusteus Saxonicus Electoralis, 2310—2367[8]. The more usual course in the present day is for a Sovereign Prince not to recall his natural born Subjects, who may be resident in an Enemy's country at the commencement of a war, but to leave them free to remain, if they please, in their adopted country, subject however to the inconvenience of being regarded and treated as enemies so long as the war may last.

§ 45. When a Nation takes up arms against another Nation, it declares itself from that time an Enemy to all the individual members of the latter, and authorises them to treat it as such. If therefore regard be had to the Natural Law of Nations, it would appear that as soon as two Nations are engaged in war, all the Subjects of the one may commit hostilities against the Subjects of the other, and do them all the damage which is authorised by the practice of Nations towards Enemies. The ancient Declarations of War were couched in language of the most general character, under which every Subject of the belligerent Sovereign was commanded to attack the Enemy, *courir sus aux ennemis*. But the milder practice of the Christian States of Europe has confined the duty of undertaking active hostili-

Commissions to carry on hostilities.

[6] The "Jus avocandi cives ex alieno territorio" has been discussed by various writers cited in Kamptz, Neue Literatur des Völkerrechts, § 277.

[7] Von Martens, § 269.

[8] Klüber, § 240.

ties against the Enemy to the commissioned officers of the State, and soldiers or sailors serving under them. "The necessity of a special order to act," says Vattel[9], "is so thoroughly recognised, that even after a Declaration of War has been made, if the country people of themselves commit hostilities, the Enemy treats them without any regard, and causes them to be hung like so many robbers or brigands[10]. The same course is pursued with respect to privateers at sea. A commission from their Sovereign or his admiral can alone, in case they are captured, ensure them such treatment as is shown to prisoners taken in regular warfare." We find, accordingly, that the phraseology of modern Declarations of War has been modified agreeably to a milder practice. Thus the last formal Declaration of War on the part of Great Britain, which was issued on 2 January 1762, against Spain, ran in this form: "We will and require our Generals and Commanders of our forces, our Commissioners for executing the office of our High Admiral of Great Britain, our Lieutenants of our several counties, Governors of our forts and garrisons, and all other officers and soldiers under them by sea and land, to do and execute all acts of hostility in the prosecution of this war against the king of Spain, his vassals, and subjects, and to oppose their attempts, willing and requiring all our subjects to take notice of the same, whom we henceforth strictly forbid to hold any correspondence or communication with the said king of Spain or his subjects." Vattel holds that, where the ancient form of language is retained in modern Declarations of War, Custom will control its interpretation. The general order embodied in such Declarations

[9] Droit des Gens, L. III. § 226.
[10] Martens, Précis, § 271. Klüber, § 246.

authorises indeed, and even obliges every Subject of whatever rank to arrest the person and property of the Enemy, when they fall into his hand; but it does not invite any Subject to undertake any offensive expedition without a commission or special order[11].

Enemy-subject within the territory of a belligerent.

§ 46. After hostilities have been once commenced, the persons of enemies are liable to detention, and their property to confiscation, if they are within the territory of a belligerent Power. The Roman Law was extremely harsh in this particular, for we find it to have been considered to be settled law in the time of the Emperor Justinian[12], that the citizens of a country, who had gone to another country in time of peace, became slaves, if war broke out between the two countries and they were seized within the enemy's territory. "According to strict authority," writes Chancellor Kent, "a State has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war[13]." Grotius holds that such persons can only be detained as prisoners of war until the termination of hostilities, on the ground that it is justifiable to weaken the power of the Enemy by detaining his Subjects whilst war continues; but upon the termination of hostilities, there can be no reasonable objection to their being set free, as they cannot be conceived to have done anything wrong[14]. Bynkershoek, whilst admitting

[11] Droit des Gens, L. III. § 227. Heffter, § 124.

[12] Dig. XLIX. Lib. XV. § 12. Verum in pace qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur, apud quos jam hostes suo facto deprehenduntur.

[13] Kent's Commentaries, L. I. § 56.

[14] In pace postliminium, nisi aliter convenerit, est his qui non virtute bellica superati, sed fato suo deprehensi sunt, ut qui, cum bellum subito exarsit, apud hostes reperiuntur. L. III. c. 9. § iv. 1. At de his qui bello exorto deprehensi erant, dici idem non poterat, nam in illis nullum injuriæ consilium fingi poterat.

the Right of a belligerent Power to seize and detain enemy-subjects, who may be within his territory at the commencement of war, speaks of that Right as being rarely exercised in his days[15]. "Captura autem quamvis apud Romanos etiam exercita sit adversus eos, qui tempore belli exoriuntis in alterius imperio inveniebantur, hodie, quamvis exerceri possit, raro tamen exercetur." Bynkershoek considers that the exhibition of forbearance in regard to enemy-subjects, under such circumstances, is a concession to humanity, unless it should have been a matter of treaty-stipulation; and that wherever there are treaty-stipulations, whereby an interval of time is secured to the Subjects of a belligerent Power to enable them to withdraw themselves and their property in safety out of the Enemy's territory, they will rightly be made prisoners of war and their property confiscated, if they should not have withdrawn themselves from the Enemy's territory within the time specified by treaty.

Treaties of Commerce.

§ 47. There are writers of eminence on the other hand, who have maintained that the series of treaties, which stipulate for the allowance of a reasonable time after the outbreak of war for the Subjects of a belligerent Power to withdraw their persons and property out of the territory of an Enemy, are but affirmations of Common Right or Public European Law. Thus Emérigon in commenting upon various modern treaties of commerce, and amongst others upon the treaty concluded between France and the United States of America (5 Feb. 1778), whereby it was provided that in case of war breaking out between the two Nations, an

Tamen ad minuendas hostium vires retineri eos manente bello non iniquum videbatur; bello autem composito nihil obtendi poterat, quominus dimitterentur. Itaque consensum in hoc est, ut tales in pace semper libertatem obtinerent, ut confessione partium innocentes. Ibid. § iv. 3.

[15] Quæst. Jur. Publici, L. I. c. 3.

interval of six months after the Declaration of War should be allowed to the merchants of either Nation, in the towns or cities which they inhabit, to collect and transport their merchandise; and that if they should suffer any damage or injury in the meanwhile at the hand of the citizens or subjects of either of the contracting parties, they should have full and entire satisfaction[16]—observes "that such treaties are nothing more than declaratory of the Common Law. In effect," he says, "he, who relying on the public faith, comes amongst us to trade, or for other lawful cause, is not to be treated as an enemy, simply because war breaks out between his Nation and our own." Vattel to the same effect says, "The Sovereign declaring war can neither detain the persons nor the property of those subjects of the Enemy, who are within his dominions at the time of the declaration. They come into his country under the public faith. By permitting them to enter and reside in his dominions, he tacitly promised them full liberty and security for their return. He is therefore bound to allow them a reasonable time for withdrawing with their effects: and if they stay beyond the term prescribed, he has a right to treat them as enemies—as unarmed enemies, however. But if they are detained by an insurmountable impediment, or by sickness, he must necessarily, and for the same reasons, grant them a sufficient extension of the term. At present, so far from being wanting in this duty, Sovereigns carry their attention to humanity still further; so that foreigners, who are subjects of the State against which war is declared, are very

Enemy-property within the territory of a belligerent.

[16] Martens, Recueil, II. p. 596. Afin de promouvoir d'autant mieux le commerce des deux côtés, il est convenu que, dans le cas où la guerre surviendroit entre les deux nations sus-dites, il sera accordé six mois après la déclaration de guerre aux merchands dans les villes et cités qu'ils habitent, pour rassembler et transporter leurs merchandises. Art. XX.

frequently allowed full time for the settlement of their affairs. This practice is observed more especially with regard to merchants, and care is moreover taken to provide for their case in commercial treaties. The king of England has done more than this. In his last Declaration of War against France, he ordered that all Frenchmen, who were in his dominions, might remain there in perfect security in regard both to their persons and their property, provided they demeaned themselves dutifully[17]." Vattel's observations are applicable also to the next following formal Declaration of War made by England (2 Jan. 1762), against Spain; the concluding paragraph of which was to this effect: "And whereas there may be remaining in our kingdom divers of the subjects of the king of Spain, we do hereby declare our Royal intention to be that all the Spanish subjects, who shall demean themselves dutifully towards us, shall be safe in their persons and effects[18]."

§ 48. If the observations of Emérigon and Vattel are limited to the natural born subjects of an Enemy, who have established themselves for the purposes of trade in the country of a belligerent Power before the breaking out of war, much may be said in favour of their view, that such parties cannot be at once treated as enemies by the belligerent Power with due regard to good faith. They are clearly distinguishable from natural born subjects of the Enemy, who are within the jurisdiction of the belligerent Power at the commencement of a war casually as visitors for the purpose of

Obligation of good faith.

[17] Droit des Gens, L. III. c. 4. § 63. Vattel published his work in 1758, he is therefore referring to the English Declaration of War against France of 17 May 1756.

[18] This Declaration of War against Spain is set forth at length in the appendix of Dr. Pratt's edition of Mr. Justice Story's Notes on the Principles and Practice of the Prize Courts. London, 1854.

trade or pleasure. A foreigner who has established a house of trade in the country of a belligerent Power, has given security as it were for his good behaviour, and is contributing by his industry and capital to promote the welfare of the country, which he inhabits, equally with its natural born citizens. The Government of the country, on the other hand, having permitted him to establish himself under its jurisdiction by the side of its natural born subjects, must be taken to have accorded its protection to him, as an adopted subject, equally as to its native subjects. It is obvious therefore that the personal relations of such an individual to the Sovereign of the country in which he has established himself, are substantially different from the personal relations of foreigners *in transitu*: and that there is a tacit contract between him and the Sovereign, that as long as he obeys his laws, the latter will accord to him his protection; but his relations of strict Right (*stricti juris*) towards the Sovereign of the country in which he has established himself, will be determined by the Territorial Law, of which he was bound to inform himself when he first established himself in the country. The Territorial Law of every Nation, for instance, prescribes for the most part certain conditions, under which a foreigner may become a naturalised subject or citizen, and as such have within its territory all the rights and privileges of a natural born subject in time of war, equally as in time of peace. But if a foreigner, resident within the territory of any particular Nation, should not have been naturalised in conformity with the requirements of its Territorial Law, his *personal status* will continue to be that of an alien, and if war should arise between his native country and the country in which he has established himself, his personal relation with the latter country will be that of an alien enemy. An indepen-

dent Power under such circumstances will be justified in case of war, in the exercise of its *strict Right*, to order him, with all other alien enemies, to quit its dominions, although he may have established himself therein *bona fide* for purposes of trade, and have acquired a commercial domicil under the Law of Nations. But in exercising his strict Right, a belligerent Sovereign must observe good faith towards such persons, and allow them a reasonable interval of time to collect and transport their goods and effects. It would be inconsistent altogether with good faith to treat them in a summary manner as enemies, unless the public safety imperatively required it,—as, for instance, if they should be in league with the Enemy, and be preparing to co-operate with an invading army. In such a case there would be bad faith on their part, and the Sovereign of the country might at once exercise his extreme Right, as a belligerent, against them with perfect good faith on his part.

§ 49. It may be affirmed, that there is now a long established Practice amongst the Christian Powers of Europe, from which it would be an immoral act for any of them to depart without notice, to refrain from seizing the effects of alien merchants, who are resident for purposes of trade within their territory at the time when war breaks out. It was one of the provisions of the Great Charter of King John (15 June 1215), that "all merchants (unless publicly prohibited beforehand) might have safe conduct to depart from, to come into, to tarry in and go through England for the exercise of merchandise, without any unreasonable impost, except in time of war; and that upon the breaking out of war with their Nation they should be attached (if in England) without harm of body or goods, until the King or his great Justiciary be informed how English merchants are treated in

the Enemy's country; and if English merchants are secure, then the enemy merchants should have the same security[19]." The early practice of England would thus appear to have been to *embargo* enemy merchants at the commencement of the war, and to release them subsequently on conditions of reciprocity being observed. Such also seems to have been the practice of the Scandinavian Nations[20]; and a passage in Matthew Paris seems to show that it had been the ancient practice of the kings of France not to seize the persons or goods of enemy merchants, who were resident within their dominions when war broke out, as he censures the conduct of Louis IX. of France in 1242, in arresting the persons and goods of the English merchants trading within the kingdom upon the breaking out of war, as contrary to duty and derogatory to the ancient dignity of the kingdom. Henry III. of England, on hearing of the king of France's severity, immediately retaliated by reprisals against the persons of French merchants resident in England[21].

Ancient practice of Provisional Embargo.

Whatever may have been the practice of France in the thirteenth century, it seems probable that the interests of international commerce had not at that period given rise to any fixed rule amongst Nations. But we find in the middle of the fourteenth century (A.D. 1354), that it was an express provision of the Law of England, that foreign merchants residing

[19] Blackstone's Commentaries, Vol. I. p. 260.

[20] Stiernhöök de Jure Sueonum, L. III. c. 4.

[21] Rex Francorum mercatorum Angliæ corpora cum suis bonis, per regnum negotiantium, secus quam decuit, capi feraliter imperavit, lædens enormiter in hoc facto antiquam Galliæ dignitatem. Cum autem hujus protervitatis infamia aures et cor Regis Angliæ tetigisset, jussit similiter ut per regnum Anglorum mercatores regni Galliæ subirent merito talionem. Matth. Paris, Hist. p. 485.

in England[22], when war broke out, should have convenient warning of forty days, by proclamation, to depart the realm with their goods; and if by reason of accident they should be prevented from so doing, they were to be allowed forty other days to pass with their merchandise, with liberty to sell the same. The example of England in this matter was soon afterwards followed by King Charles V. of France, when he issued an ordinance declaring that foreign merchants who should be trading in France at the time of the Declaration of War, should have nothing to fear, for they should have liberty to depart freely with their effects[23].

Enemy-subjects resident in the territory of a belligerent.

§ 50. In the fifteenth century the importance of international commerce began to be generally appreciated by Governments, more particularly as the Confederation of the Hanse Towns gave great political weight to mercantile interests; and we find accordingly a treaty concluded between the Hanse Towns and Louis XI. of France (anno 1483) under which merchants of the Hanse Confederation were to be at liberty to remain in the French dominions for one year after war broke out, with protection of persons and goods. In the next century it came to be a common stipulation in treaties of commerce, that a period of time, varying from three months to two years[24], should be allowed to the subjects of the contracting parties, after war should have been declared, to withdraw themselves and their goods and effects in safety from the enemy's country. France seems to have been eminently the leading Power in entering into such treaties[25]. Thus we find a treaty concluded

[22] Statute of Staples, 27 Ed. III. c. 17.

[23] Hérault, Abrégé Chronologique de l'Histoire de la France, L. I. p. 338.

[24] Dumont, Corps Diplom. L. III. p. 23.

[25] In the treaty between Por-

in 1662 between France and the States General of the United Provinces, under which an interval of six months was to be allowed to the subjects of either of the contracting parties, if war should arise between them, to withdraw with their goods and effects from the Enemy's country. A treaty in like terms was concluded not long afterwards, between England and the States General (31 July 1667). Where there were no such treaty engagements, all that good faith could require was, that a reasonable time should be allowed for merchants to withdraw from an Enemy's country. We find accordingly that Louis XIV. of France, in declaring war against England on 26 January 1666, being under no treaty engagements with that Power to allow any definite time to English merchants to withdraw from his dominions, issued nevertheless a Proclamation (1 Feb. 1666), to the effect that "his Declaration of War was not intended to operate against those individuals of the English Nation who might be resident in France with peaceful intentions, but that they might withdraw in safety with their goods and effects within three months, saving always to such individuals, as might have become naturalised, the right of remaining in France as French subjects." It would appear from a long series of precedents too numerous to be cited in detail, that the obligation of good faith towards resident foreigners has been acknowledged by the practice of belligerent Powers to operate as a restriction upon the exercise of their *summum jus*, as,

tugal and the States General (6 Aug. 1660) it is provided "that the subjects of either power, if war should break out between them, shall have two years to withdraw their goods." So long an interval is accounted for by the circumstance, that one or both of the contracting parties had colonies or dependencies in the East or West Indies.

belligerents, to seize and detain them as enemies upon the outbreak of war. It is otherwise, however, with foreigners, who are *in transitu*, and happen to be within the territory of a belligerent Power at the time, when war has been commenced against the Sovereign, to whom they owe allegiance. Between such persons and the Government of the country, in which they may happen to be, there is no such implied contract as exists in the case of foreigners, who have been permitted by its laws to establish themselves within its territory on the same footing for purposes of trade as its natural born subjects.

Enemy-subjects *in transitu*.

§ 51. The exercise of the *summum jus* of a belligerent in regard to enemy-subjects *in transitu* is not altogether obsolete, although it may be regarded as a matter of Comity between belligerent Powers to refrain from seizing and detaining, as prisoners, any enemy subjects whatsoever, who may happen to be within their respective dominions at the outbreak of war, if they conduct themselves without offence. A remarkable exception to this Comity took place upon the commencement of war between England and France in 1803, when the First Consul issued an ordinance that "all the English from the age of eighteen to sixty, or holding any commission from his Britannic Majesty, who are at present in France, be constituted prisoners of war, to answer for those citizens of the Republic, who may have been arrested and made prisoners by the vessels or subjects of his Britannic Majesty previous to any Declaration of War." This ordinance bore date 22 May 1803, and purported to be issued on a Report received on that very day from the Maritime Prefect at Brest, announcing that "two English frigates had taken two French merchant vessels in the Bay of Audierne without any previous Declaration of War, and in

Detention of British subjects in France by the First Consul in 1803.

manifest violation of the Law of Nations. It appears that the British Ambassador, by order of his Government, had demanded his passports and left Paris on the 12th of May, the British Government had issued Letters of Marque and Reprisal on the 16th of May, and his Britannic Majesty had sent a message to Parliament on the 18th of May: on the other hand, the French Ambassador had left Dover on the 18th of May, and the First Consul had sent a message to the Senate on the 20th of May, announcing that the negotiations with Great Britain were broken off, and that France was ready for the combat if she was attacked[26]. It can hardly be disputed, that under these circumstances the capture of the French merchant vessels by the British frigates, which took place on the 20th of May, was an act of War lawfully commenced. It is also clear that the commencement of actual hostilities without any formal Declaration of War on either side was contemplated by the French Government, for the French Minister of Marine had already issued Letters of Marque against Great Britain[27] on the 21st of May, before the French Government received the announcement of the capture of the French vessels by the British frigates. Great Britain had by her own act undoubtedly given rise to a state

[26] Les négotiations sont interrompues, et nous sommes prêts à combattre, si nous sommes attaqués. Message au Sénat 30 Floreal an. xi. (20 May 1803.) —Correspondence de Napoleon, VIII. p. 320.

[27] There is a letter of 21 May 1803 from the First Consul to the Contre-Amiral Decrès, Minister of Marine and of Commerce, requesting him to send twenty-four letters of marque to various French General Officers for distribution. The letters were to be sent in blank, so that no time might be lost in doing all the damage possible to English commerce. Ces lettres seront données en blanc, pour qu'ils puissent être à même de profiter de toutes les occasions, et de ne perdre aucun moment pour faire au commerce Anglais tout le tort possible. Correspondence de Napoleon, VIII. p. 321.

of war between the two Nations on the 20th of May, and the First Consul was entitled to use the Right of a belligerent Power towards British subjects after the capture of the French merchant vessels, but not in the way of extraordinary Reprisals, such as he directed to be executed throughout the Italian Republic[28], as well as throughout France, inasmuch as the act of the British Government involved neither in form nor in substance any departure from the practice, which had been observed in previous wars between Great Britain and France[29]. M. Thiers[30] has represented the First Consul to have originally intended to arrest all the English indiscriminately, but to have given way to the urgent remonstrances of the Minister Cambacérès, and to have so far modified his original purpose, as only to order the arrest of such British subjects as were serving in the Militia[31], or held some commission from the British Government. But this statement of M. Thiers is

[28] Toutes les Marchandises Anglaises qui se trouveront dans la République Italienne seront confisquées au profit de la République, et tous les Anglais qui s'y trouveront, séront arrêtés et constitués prisonniers de guerre. (Letter of the First Consul to Citizen Marescalchi, Minister of Foreign Affairs for the Italian Republic, 2 Prairial an. XI. (22 May 1803.) Correspondence de Napoleon, Tom. VIII. p. 322.

[29] Madame la Duchesse d'Abrantes, in her Memoirs of Napoleon, (Tom. VI. p. 405.) narrates the particulars of the interview between the First Consul and her husband, General Junot, when the First Consul ordered General Junot to arrest all the English without any exception. The latter remonstrated with the First Consul, and pointed out to him that there were women and children and old men and merchants amongst them, and that many of them had remained in Paris, trusting to the express assurances of the Minister of Foreign Affairs, that they would be in perfect security.

[30] Histoire du Consulat et de l'Empire, Tom. IV. p. 348.

[31] The Duchesse d'Abrantes represents Napoleon to have yielded to the remonstrances of Cambacérès, so far as to allow the English, who were arrested, to be at large on their parole in the towns, to which they were confined as prisoners; and when Junot expressed by his looks his surprise at Napoleon declaring that he would use his Right against them, as Prisoners of

not consistent with the language of the Ordinance itself, or with the facts which attended its execution; for the orders, issued under the hand of the First Consul himself, and which are to be found amongst his published correspondence, were to arrest all English subjects without any distinction; and ten thousand British subjects of all classes indiscriminately were seized and detained as prisoners of war, many of whom were even thrown into prison, from which they were not liberated until the allied armies entered France in 1814. The conduct of the French Consul on this occasion must be regarded as altogether exceptional to the modern practice of Nations. Reprisals for the capture of the French vessels was the colourable pretext for his measures, but they were in reality prompted by the exaggerated, if not false, reports of the French police, that the British subjects, who had been allowed to remain in Paris, were plotting against the French Consul[32]. An American jurist, in commenting upon the Ordinance of the First Consul, observes that the Law of Retaliation would hardly seem to require, or even to justify, a resort to means so unusual and odious, although within the extreme limits fixed by the ancient and severer rules of war[33].

§ 52. "Although," writes Klüber, "the Natural Law of Nations does not forbid us to use force against the Subjects of an Enemy-Sovereign, wherever they may be found, yet the usage of war, as established in Europe, restricts the exercise of this Natural Right in regard to those Subjects, who cannot be regarded personally as having taken any part in

War, Napoleon exclaimed, Oui, prisonniers de la guerre. Ne font ils pas partie des milices du Royaume? Memoires de Madame la Duchesse d'Abrantes, p. 410.

[32] Memoires de Madame la Duchesse d'Abrantes, vol. I. p. 406.

[33] Halleck's International Law, p. 362.

the offence which has given rise to war, nor as taking any part in hostilities." Accordingly it is very rare that any measures of rigour are employed against the latter class of Enemy-Subjects beyond what the necessities of war require in order to prevent them ranging themselves on the enemy's side, and augmenting his active force. In accordance with these principles, the subjects of a sovereign, who has become an enemy, are permitted freely to return to their country after a certain delay, and sometimes they are permitted by a belligerent Power to continue altogether in its territory without molestation[34]. Heffter to the same purport writes, "that Enemy-Subjects, who are found within the territory of a belligerent Power at the commencement of war, ought to be allowed an interval of time to depart. Circumstances nevertheless may render a temporary detention of them necessary, in order to prevent them communicating to their fellow countrymen the plans of the belligerent[35]." Lord Stowell, in commenting upon the modifying influence which the practice of Nations has exercised on the Natural Right of belligerents, observes, "that on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner in which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes, which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes[36]." It may be said in like

Modern practice not to detain enemy-subjects.

[34] Klüber, § 246, 247. [35] Heffter, § 126. ii.
[36] The Fladoyen, 1 Ch. Rob. p. 140.

manner that the exercise of the Right of a belligerent Power at the commencement of war to seize as prisoners of war all Enemy-Subjects within its territory, although it may have been in ancient times conformable to the practice of Nations, and in restraint of the Natural Right of a belligerent to put his enemies to death, has undergone further restraint, with the increased intercourse of Nations in time of peace; and that such Right may not be exercised in the present day by any belligerent Power without an odious deviation from a milder practice, to which all belligerents are bound in good faith to conform themselves.

§ 53. The exercise of the Right of a belligerent Power to seize and confiscate all enemy's goods found within its territory at the commencement of war, has likewise undergone considerable modification; as it is not the practice to seize and confiscate the goods of an enemy which are on land, nor the debts contracted by the belligerent Power or by its Subjects with the enemy before war broke out. "Between debts contracted under the faith of laws, and property acquired in the course of trade, reason draws no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of war may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade." Such is the language of a most eminent American Jurist, Chief-Justice Marshall[37].

Debts due to enemy-subjects.

§ 54. Mr. Justice Story, on the other hand, seems to impugn the suggestion that the exercise of the right of seizure and confiscation has become modified by usage, although he admits that the exception made by Vattel, namely, that the Sovereign in declaring war can neither detain the persons nor the property

[37] Brown *v.* the United States, 8 Cranch, p. 123.

of those subjects of the enemy, who are within his dominions at the time of the declaration, because they come into them upon the public faith[38], "is highly reasonable in itself, as confined to the property of persons who are within the country." But even limited as it is, he says, it does not seem followed in practice; and Bynkershoek is an authority the other way[39]. But Mr. Justice Story, in illustrating the exercise of hostile Right, the *summum jus*, in such matters, does not allege any other instances than those in which enemy-vessels and cargoes found afloat in the ports of a belligerent at the commencement of war have been embargoed, and ultimately confiscated as prize of war. "Of the Right of a State to seize vessels and cargoes found in her ports on the breaking out of war, I do not find," he says, "any denial in authorities which are entitled to much weight; and I therefore consider the rule of the Law of Nations to be, that every such exercise of authority is lawful, and rests on the sound discretion of the Sovereign." It will be seen then that Mr. Justice Story maintains in practice nothing beyond the limited exercise of hostile Right in regard to enemy's property, which may be afloat in the ports of a belligerent Nation at the commencement of war, and in the exercise of which Right, as perfectly lawful under the Admiralty jurisdiction, all jurists concur. But when Mr. Justice Story goes further, and holds that a belligerent Power may lawfully authorise the confiscation of enemy's property, whenever by the rigour of the Law of Nations it may be rightfully seized; and that however odious it may be deemed in modern times, a belligerent Power has the Right to confiscate all debts due from its own subjects to

Opinion of Mr. Justice Story.

[38] Vattel, Droit des Gens, L. III. c. IV. § 63.

[39] Bynkershoek, Quæst. Jur. Pub. L. I. c. II, III, VII.

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enemy-subjects, it becomes necessary to distinguish between the existence of a Right, which by the rigour of the Law of Nations is inherent in the Sovereign Power of every independent State, and the exercise of that Right as it is controlled by the usage of Nations. There may be a warrant of Natural Right for the Executive Government of every belligerent State to confiscate enemy's property, in whatever form it may be, if it is found in a place which is subject to its sovereignty; and yet there may be a restraint imposed by the usage of Nations upon a belligerent State exercising its extreme Right of Sovereignty in certain cases, which restraint it cannot disregard consistently with good faith.

The rules of law, which Courts are bound to administer, are not always identical with the rules of conduct, which Nations are bound to observe in their intercourse with one another. The functions of the judiciary body in every State are defined by the Sovereign Power of the State, in regard to the law which they are called upon to administer: so likewise the judicial tribunals may be limited and controlled in their field of view by the executive authority, or by the territorial legislature; and it is not within the province of the judiciary body to criticise or call in question the good faith of the State, if it has authorised it to administer the *summum jus* of belligerents. But as between Nations Good Faith must be upheld at the sacrifice of absolute Right; and if it should be inconsistent with International Good Faith for a State to exercise the *summum jus* of a belligerent in certain matters, it would be against the modern Law of Nations for a State to authorise its Courts to administer the *summum jus* of a belligerent in such matters. Mr. Justice Story seems to consider, that foreign Nations, with whom there is not a treaty to

the contrary, could only complain of such an act as a violation of the modern policy; but this matter seems to rest upon more solid foundations than those of mere policy. Mr. Justice Story holds, and in this respect he has the concurrence of all jurists, that if a Nation has stipulated in a treaty of commerce with another Nation that, if war should break out between them, they will mutually refrain from exercising their extreme Rights as belligerents in certain matters, either Nation would have just ground of complaint, if the other should not conform its conduct to the treaty stipulations; but in maintaining this position Mr. Justice Story concedes the whole question, and upholds the obligation of Good Faith at the sacrifice of Absolute Right; for war terminates, or at least suspends, the obligations of commercial treaties, as such, and no obligation remains after the breaking out of war, but that of Good Faith, to bar the exercise of all the Rights on the part of Nations, which a State of War gives rise to. Treaty stipulations in such matters only serve to give greater precision to the obligations of Good Faith; but they are not necessary to create those obligations, which may arise, and will be equally binding without any written specification of them[40]. A specific contract in fact differs only from an implied contract in the mode of proof[41].

§ 55. The Right of a belligerent Power to confiscate debts contracted by itself or by its Subjects in time of peace with individuals, who by the breaking out of war have become clothed with an enemy-character,

[40] The case of Brown *v.* the United States, 8 Cranch, p. 121, was an appeal to the Supreme Court of the United States, from a judgment of Mr. Justice Story in the Circuit Court of Massachusetts. The Emuleus, 1 Gallison, p. 136.

[41] Chief-Justice Erle, in Kennedy *v.* Broun, Queen's Bench, Jan. 16, 1863.

rests very much upon the same principle, as the right of confiscating the property of enemy-subjects which is found in the country of a belligerent at the commencement of war. Mr. Chancellor Kent however considers that the objection to the right of confiscation in the case of debts is much stronger than the objection to the right of confiscating the tangible property of an enemy. It may be conceded that if the extreme right of a belligerent is to be exercised against an enemy, the latter is in strict right absolutely at the mercy of his adversary; and no limits can be set to the exercise of the *summum jus*, than those which compassion for the vanquished may suggest. But war is not carried on in this spirit between Christian Nations. It has been the constant effort of the wise and the good amongst statesmen, whose more especial province it has been to regulate the intercourse of Commonwealths, to mitigate the exercise of hostile Right between Nations; and wheresoever the practice of Nations has, under their influence, restrained the exercise of the *summum jus*, individual Nations cannot revive its exercise without a violation of good faith. Vattel, who considers that the *summum jus* of a belligerent warrants the confiscation of debts due to his adversary, says, "At present, a regard to the advantages and safety of commerce has induced all the Sovereigns of Europe to act with less rigour in the subject of confiscating debts due from their subjects to an enemy. And as the custom has been generally received, the Sovereign who should act contrary to it would violate public faith; for strangers have trusted his subjects only from a firm persuasion that the general custom would be observed[42]." Bynkershoek is the only jurist of eminence who holds it to be a matter of Common Right for a belligerent

Chancellor Kent.

Vattel.

Bynkershoek.

[42] Droit des Gens, Lib. III. c. v. § 77.

Sovereign to confiscate upon the outbreak of war the debts due from himself or his Subjects to the Enemy. There are however passages in Grotius and Puffendorf, which are frequently cited as being in accordance with Bynkershoek's views, but these passages, if carefully examined, will be found to bear upon another subject—namely, the right of a belligerent, who is in possession of an enemy's country by Right of Conquest, to appropriate to himself the debts due from neutral Nations to the Enemy whom he has conquered, as well as the tangible property of the Enemy. The instance which is given by both those writers is that of Alexander the Great, who by conquest had become master of the City and State of Thebes, and thereupon remitted to the Thessalians a debt due from them to the Thebans. In this case the conqueror in the war considered himself to have succeeded, by Right of Conquest, to the title of the conquered State to exact or remit the debt due to it from the Thessalians. Now Grotius holds this transaction to have been well founded in Right, on the ground of the absolute conquest and subjection of the City and State of Thebes: "Nam qui dominus est personarum, idem et rerum est, et juris omnis quod personæ competit[43]." But it is one thing to claim dominion over incorporeal Rights which are annexed to corporeal things, such as cities or countries, by reason of such corporeal things being reduced into our possession by conquest, and another thing to claim dominion over incorporeal Rights belonging to persons, more especially when such persons have not been made captive.

§ 56. It is a well understood position of Law, that if a subject of any commonwealth be taken by an

[43] L. III. c. VIII. tit. iv. § 2. Qui possidetur, non possidet sibi, nec in potestate habet, qui non est suæ potestatis.

enemy, his goods, which were not taken with him, are not acquired by the conqueror, but fall to him who would have been his heir at law, if he had died a natural death[44]. "How then," asks Lord Ellenborough, "can things belonging to a person who has not been made captive, be legally acquired by an enemy, who is not a conqueror either as to the person or the thing?"

Judgment of Lord Ellenborough, in Wolff v. Oxholm.

Lord Ellenborough, on the occasion of making the above observation, was delivering the judgment of the Court of Queen's Bench[45] (anno 1817,) in a suit brought by a British subject against a Danish subject for a debt, which the latter alleged to have been confiscated by the Danish Government under an Ordinance issued by it at the commencement of war with Great Britain in 1807. On this occasion Lord Ellenborough said that the Court had been unable to discover that there ever was a time when it was the general practice of Nations to confiscate debts; that, although Bynkershoek had cited some instances of such confiscations in the sixteenth and seventeenth centuries, and there was a solitary decision about the middle of the sixteenth century by a Court in Paris against a Fleming, who was suing a Frenchman to recover from him a debt which he had paid into the French Treasury in obedience to a French decree during war between the two Nations, yet there was not a single instance of such a confiscation to be found for something more than a century, whilst the right was not recognised by Grotius, and was impugned by Puffendorf and others. The Court accordingly held that, as the Danish Ordinance was not conformable to the usage of Nations, it was not bound to pay regard to it. Lord Alvanley, in the case of Furtado

[44] Puffendorf, L. VIII. c. 6. § 22.

[45] Wolff *v.* Oxholm, 6 Maule and Selwyn, p. 92.

v. Rogers, 3 Bosanquet and Puller, p. 191, said, "With respect to the argument, that all contracts made with the enemy accrue to the benefit of the King during war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted, nor is it probable that it ever will be adopted, as well from the difficulties attending it, as from the disinclination to put in force the Prerogative." It is worthy of remark that even Bynkershoek [46] admits that there were doubts in his time whether the incorporeal rights of an enemy could be confiscated by a belligerent; and he cites an instance of the States General (6 July 1673,) refusing to pay regard to an Ordinance of the French King, which confiscated certain debts due from French subjects to subjects of the States General. Mr. Justice Story is therefore not strictly warranted in affirming that down to the year 1737 [47] it may be considered as the opinion of jurists, that the right of a belligerent to confiscate debts due to his enemy at the commencement of war was unquestionable. This eminent jurist does not in either of his elaborate judgments [48] take any notice of the decision of the Court of King's Bench at Westminster in Wolff *v.* Oxholm. Mr. Chancellor Kent, on the other hand, refers to that judgment in a note, and admits that the weight of modern authority and of argument is against the claim of Right on the part of a belligerent

[46] De incorporalibus tamen, ut sunt actiones et credita, dubitari video, et dubitasse, quin et aliquando contradixisse nostros ordines. Quæst. Jur. Publici, L. I. c. VII.

[47] Mr. Justice Story adopts the year 1737 as being the date of the publication of Bynkershoek's Quæstiones Juris Publici; but Mr. Wheaton aptly remarks that Bynkershoek adduces no precedent later than the year 1667, seventy years before the publication of his work.

[48] The Emulous, 1 Gallison, p. 563. Brown *v.* the United States, 8 Cranch, p. 121.

Sovereign to confiscate the debts and funds of the Subjects of the Enemy during war. "This right," he goes on to say, "was admitted by the American Courts to exist as a settled and decided Right *stricto jure*, though at the same time it was considered to be the universal practice to forbear to seize and confiscate debts and credits; we may therefore lay it down," he says, "as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in the United States, that it rests on the discretion of the legislative of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy; but, as it is asserted by the same authority, this Right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic Right, condemned by the enlightened conscience and judgment of modern times[49]." Mr. Wheaton[50] questions the soundness of the judgment of the Court of Queen's Bench in Wolff *v.* Oxholm; but he admits that the Right only exists theoretically, and is seldom or never practically exerted. Emérigon, Klüber, Chitty, Manning, and Phillimore, concur in holding that the modern Law of Nations repudiates the confiscation of debts due to an enemy at the outbreak of war; and it is beyond controversy, that if a Sovereign Power should, in the present day, exercise the extreme Right of a belligerent in confiscating debts due from its Subjects to Enemy-Subjects, other Nations would be justified by the modern usage in refusing to recognise such an avoidance of the contract in regard to their own Subjects.

Wheaton.

§ 57. War, however, whilst it does not avoid a contract which was originally valid, suspends the

[49] Commentaries, Tom. I. p. 65.
[50] Elements, Pt. IV. c. 1. § 12.

remedy for the non-observance of it, until peace has been restored. It is the doctrine of all the writers of authority on the Law of Nations, and a rule of the maritime ordinances of all the great Powers of Europe, that War puts an end to all commerce between the subjects of adverse belligerent Powers; and this doctrine is in conformity with the universal and immemorial usage of civilised Nations. All contracts accordingly made with the enemy during war are legally void; that is, Courts of Law will not give effect to them. But the same necessity which precludes a belligerent from allowing his subjects to enter into contracts with the enemy during war, authorises him to forbid his subjects to fulfil their contracts made before war, until the necessity of weakening the enemy, by cutting off his supplies, shall have passed away upon the cessation of war. It is a principle of law, says Lord Stowell[51], that during a State of War there is a total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the inhabitants of the other. In the law of almost every country, the character of an alien enemy carries with it a disability to sue or to sustain in the language of civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the Law of Nations: they are so far British Courts, that no man can sue therein, who is a subject of the enemy, unless under particular circumstances, that *pro hâc vice* discharge him of the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *exlex*. But the right of

Suspension of commercial contracts.

[51] The Hoop, 1 Robinson, p. 201.

an alien to enforce a contract, which is suspended whilst he is an alien enemy, will revive as soon as he is again clothed with the character of an alien friend. Such is the doctrine maintained by the English Courts both of Law and of Equity. The Lord Chancellor Eldon[52], in admitting a debt to be proved on behalf of an alien enemy against the bankrupt estate of an English merchant, said, "If this had been a debt arising from a contract entered into with an alien enemy during war, it could not possibly stand, for the contract would be void: but if the two Nations were at peace at the date of the contract, though from the time of war taking place the creditor could not sue, yet the contract being originally good, upon the return of peace the right would revive. It would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be "divided amongst the creditors." Such also, says Mr. Wheaton[53], is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery, on the restoration of peace between the two countries.

Debts due by an enemy-sovereign.

§ 58. The Right of confiscating the public debts of a State, if war breaks out between that State and the country, of which the creditors of the State are subjects, deserves a separate consideration. The question arose for the first time, as a great question of Public Law, upon the occasion of the King of Prussia, by way of retorsion for the capture of Prussian vessels by British cruisers, attaching certain

[52] Ex parte Bousmaker, 13 Vesey, p. 71.

[53] Elements, Part IV. c. 1. § 12.

capital funds, which his Majesty had undertaken to reimburse to the subjects of Great Britain in virtue of the Treaties of Breslau (11 June 1742[54]) and of Dresden (25 Dec. 1745[55]), with the view of indemnifying his own subjects out of those funds. Under those treaties the King of Prussia had engaged himself to the Empress Maria Theresa to pay off more than a million of money, which had been lent by British subjects to the Emperor Charles VI. upon the mortgage of the Duchies of Silesia, which were ceded by those treaties to Prussia, and of which the possession was guaranteed to Prussia by Great Britain under the Treaty of Dresden. The consideration for Prussia undertaking to discharge the debt contracted by the Emperor, was the cession of the Duchies of Silesia; and Prussia was in possession of those Duchies at the time when the King of Prussia proposed to confiscate all the debt due to British subjects. But the King of Prussia had undertaken to pay the money *selon le contrat*, and the English jurists contended in the memorable reply[56] presented by the Duke of Newcastle, in answer to Mr. Michell's memorial on behalf of his Prussian Majesty, that the late Emperor could not have seized the money as reprisals, or even in case of open war between the two Nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. "It will not be easy to find," they say, "an instance where a person has thought fit

Conduct of Prussia in regard to the Silesian Loan.

[54] Wenck, Codex Jur. Gent. I. p. 739.

[55] Ibid. II. p. 195.

[56] This reply, which was drawn up by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, his Majesty's Advocate General, Sir Dudley Ryder, Attorney General, and Mr. Murray, Solicitor General, has been pronounced by Vattel (L. II. c. 7. § 84. N. ed. 1758) to be un excellent morceau de droit des Gens, and by Montesquieu (Lettres Persanes, L. XIV.) une réponse sans réplique. It will be found in the Collectanea Juridica, vol. I. p. 129.

to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done: a private man lends money to a Prince upon the faith of an engagement of honour, because a Prince cannot be compelled, like other men, in an adverse way by a Court of Justice. So scrupulously did England, France, and Spain, adhere to this public faith, that even during the war they suffered no inquiry to be made, whether any part of the public debts was due to the subjects of the enemy, though it is certain many English had money in the French Funds, and many French had money in ours." Vattel, writing almost immediately after the publication of the British Reply, says, "The State does not so much as touch the sums which it owes to the Enemy: money lent to the Public is everywhere exempt from confiscation and seizure in time of war[57]." It is obvious that it would be contrary to natural justice for a State to reap the benefit of a loan, of which it retains possession, and at the same time to refuse to pay the equivalent for that benefit, which it pledged its faith to pay when it accepted the benefit. It is not like the case in which a State has undertaken to grant a favour to the subject of a friendly Power, the continued enjoyment of which may be reasonably taken to be conditional on the continuance of friendship between the two States.

Conduct of Great Britain in regard to the Russian-Dutch Loan.

The payment of a moiety of the Russian-Dutch Loan is an instance of an obligation undertaken by Great Britain for a permanent equivalent, in consideration of Holland agreeing that Great Britain should retain certain Dutch colonies and dependencies, of which Great Britain was in possession at the conclusion of

[57] L. III. ch. 5. § 77. L'État ne touche par même aux sommes qu'il doit aux Ennemis; partout les fonds confiés au public sont exempts de confiscation et de saisie en cas de Guerre.

the war in 1814. Great Britain took upon herself the payment of a moiety of a certain loan contracted in Holland by Russia during the war. It was further recited in the fifth Article of the Convention of London[58], (19 May 1815), that "it was understood and agreed between the high contracting parties, (Great Britain, the Netherlands, and Russia,) that the payments on the part of the King of the Netherlands and the King of Great Britain should cease and determine, (such payments being payments of an annual interest of five per cent., together with a sinking fund of one per cent.) if the possession and sovereignty of the Belgic Provinces should at any time pass or be severed from the dominion of the King of the Netherlands at any time before the complete liquidation of the same: and that it was also understood and agreed between the high contracting parties, that the payments on the part of their Majesties the King of the Netherlands and the King of Great Britain, as aforesaid, should not be interrupted in the event of a war breaking out between any of the three high contracting parties; the Government of his Majesty the Emperor of All the Russias being formally bound to his creditors by a similar agreement." Upon the separation of the Belgic Provinces from the Kingdom of Holland in 1831, Great Britain entered into a new Convention with Russia, conceiving that though the event had happened, which, according to the *letter* of the Convention of 1815, released Great Britain as well as Holland from the obligation of continuing to pay off her portion of the loan, Great Britain was still bound, according to the *spirit* of that Convention, which was made on her part in consideration of the general arrangements of the Congress of Vienna, to adhere to her

[58] Martens, N. R. II. p. 290.

engagements. A new Convention between Russia and Great Britain was accordingly executed, (London, 16 Nov. 1831[59],) whereby the King of Great Britain undertook to recommend to the British Parliament that it should enable him to continue the payments stipulated in the Convention of the 19th of May, 1815, conformably to the manner and until the liquidation of the sum therein specified. Notwithstanding that open war arose between Great Britain and Russia in 1854, Great Britain never faltered in her good faith in the matter of the understanding between herself and the other two Powers, as set out in the fifth Article of the Convention; and the interest and instalments of the loan have been regularly voted without the slightest interruption by the British Parliament and paid by the British Government to the agents of the Russian Government. Further, when a motion was made by Lord Dudley Stuart in the House of Commons in the month of August 1854, during the war with Russia, that Great Britain should renounce her obligation to make any further payments of the loan upon the ground that Russia had violated the general arrangements of the Congress of Vienna, the motion was rejected on this, amongst other grounds, that "Great Britain, being at war with Russia, was bound by a regard to National Honour to be more than ever jealous of affording the slightest ground for the accusation, that she wished to repudiate debts justly contracted with the Power, which was for the time her Enemy."

Embargo of enemy-property afloat within the ports of a belligerent.

§ 59. The practice of seizing and confiscating the vessels and cargoes of Enemy-Subjects which may be within the ports of a belligerent at the commencement of war, is a tradition of the Admiralty jurisdic-

[59] Martens, N. R. IX. p. 542. Hertslet, IV. p. 367.

tion exercised in common by Nations over all vessels and their cargoes, which may be in creeks or havens accessible to tidal waters. Mr. Justice Story, in discussing the right of confiscating enemy-property, distinguishes between property which may be water-borne, and property which is on the land, and inclines to hold that, whilst the former may be proceeded against as prize under the Admiralty jurisdiction, the latter, if liable to seizure and condemnation at all in the Courts of the belligerent Power, would have to be proceeded against in the manner applicable to Municipal confiscations[60].

It would seem that the Admiralty, which is an Institution of the Law of Nations, exercises an original jurisdiction exclusive of every other Judicature in matters of prize; and that the Admiralty has from time immemorial exercised its prize jurisdiction over vessels and their cargoes, which are afloat in ports and harbours, equally as over those which may be on the High Seas; and that Municipal Courts, as such, do not enquire into a question of prize or no prize, which has been decided by the Admiralty[61]. By the Law of Nations property, which is afloat on tidal waters within a port or harbour, is not subject to the Municipal Law of a State in the same exclusive manner, as property which is upon the land. Being therefore not subject to the exclusive control of the Sovereign of the territory, it is not within his protection in the same absolute manner as property on the land; and Nations have not been accustomed to regard it as an act of bad faith, if a belligerent Sovereign at the commencement of war should have seized all enemy-vessels, which were afloat within his ports. This distinction between the *concurrent* jurisdiction,

[60] Brown *v.* the United States, 8 Cranch, 139.
[61] Le Caux *v.* Eden. Douglas, p. 614.

which all Nations exercise over vessels and cargoes which are afloat within the flux and reflux of the tide, and the *exclusive* jurisdiction, which each individual Nation exercises over all persons and things which have been landed on its soil, may serve to explain in some respects the difference in the treatment, which enemy-property afloat has in practice undergone at the commencement of war, as contrasted with enemy-property which has been landed and remains on land. The circumstance that the cognisance of all seizures of vessels and their cargoes when afloat, as prize of war, belongs to the Admiralty jurisdiction, is evidence of the high antiquity of the practice of such seizures. The maintenance of this practice is becoming more open to question, as being scarcely reconcilable with that good faith, upon which the enlarged commercial intercourse of Nations proceeds.

Conduct of the Allied Powers at the commencement of the war against Russia in 1854.

§ 60. We find, accordingly, that the Queen of Great Britain, upon the breaking out of war with Russia in 1854, in ordering an Embargo to be laid upon all Russian vessels that should thereafter enter any British port, harbour, or roadstead, being desirous to lessen as much as possible the evils of war, directed by an Order of the same date[62], "that Russian merchant vessels, in any ports or places within her Majesty's dominions, should be allowed six weeks for loading their cargoes and departing from such ports and places; and further, should not be molested, if met at sea by any British cruiser." Great Britain went even further in moderating the exercise of belligerent Right, by directing that "any Russian vessel which should have sailed from a foreign port, prior to the date of her Majesty's Order, bound to any

[62] Orders in Council of 29 March 1854, published in the second supplement to the London Gazette of 29 March 1854.

port or place of her Majesty's dominions, should be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by a British cruiser, should be permitted to continue her voyage to any port not blockaded." The conduct of the Emperor of the French was distinguished by the same mildness towards Russian merchants trading in the French dominions; and the Emperor of All the Russias reciprocated the treatment, which Russian subjects had experienced in the British and French ports, by proclaiming a similar indulgence to British and French merchants trading in the ports of the Russian Empire. The conduct of the belligerent Powers on this occasion marks an epoch in the practice of Nations in regard to the exercise of belligerent Right at the immediate outbreak of war. There are not found in the Treaties of Commerce[63], which existed between Russia on the one hand and France and Great Britain respectively on the other hand, any stipulations which provide that enemy-merchants shall be treated with forbearance on the outbreak of war. It has been therefore upon the promptings of *good faith*, that Great Britain and France have set the example on this occasion of renouncing the exercise of belligerent Right in seizing and confiscating the vessels and cargoes of Enemy-Subjects, which were in their ports at the commencement of war. It must be observed, however, that the war on this occasion, which Great Britain and France held themselves compelled to declare against the Emperor of All the Russias, was

Russian Reciprocity.

[63] Treaty of Commerce between Russia and Great Britain (11 January 1843). Martens, N. R. Gén. V. p. 8. Treaty of Commerce between Russia and France (16 September 1846). Martens, N. R. Gén. IX. p. 335.

a war undertaken not for the redress of injuries received by the Subjects of either of those Powers, but for the protection of the dominions of their Ally, the Sultan of the Ottoman Empire, against the encroachments and unprovoked aggression of the Emperor of All the Russias. It was not a war, therefore, in which Reprisals against the property of Russian Subjects would have been permissible by the practice of Nations, before war had been commenced. The precedent therefore does not apply to cases in which there has been a denial of redress for injuries received, and in which, by the practice of Nations, the Subjects of the State, that has inflicted injury upon the Subjects of another State, are liable to have their ships and cargoes seized and confiscated for the indemnification of the injured parties before war is declared.

Immovable property of enemy-subjects within the territory of a belligerent.

§ 61. With regard to immovable property, such as land and houses, Bynkershoek[64], who is the most strenuous advocate of belligerent Right, whilst stating that a belligerent Power, on general principles, is entitled to confiscate any real property which an Enemy-Subject may possess within its territory, admits that the practice throughout Europe has been to sequestrate the profits only during the war, and to reinstate the owner in his property on the return of peace. Vattel[65] to the same effect says, that "he who declares war does not confiscate the immovable property possessed in his country by his Enemy's Subjects. By permitting them to purchase and possess such property, he has in this respect admitted them into the number of his own Subjects. But the income may be sequestrated, in order to prevent its being remitted to the enemy's country."

[64] Bynkershoek, Quæst. Jur. Publ. L. I. c. 7.

[65] Droit des Gens, L. III. c. 5. § 76.

CHAPTER IV.

RIGHTS OF A BELLIGERENT WITHIN THE TERRITORY OF AN ENEMY.

General Right of a Belligerent against Enemy's property—Regulated exercise of that Right—Right within Enemy's territory—All movable property within it booty of war—Military contributions in lieu of booty—Destruction of military stores and provisions—Devastation of crops—Immovable property of enemy-subjects—National Domain of an Enemy—State Papers and Public Archives—Public Libraries and Museums—Restitution of the works of Art collected in the Gallery of the Louvre in 1815—Opinion of the Duke of Wellington—Wheaton's view—Decision of a British Prize Court—Destruction of the Capitol at Washington in 1814, on the ground of retaliation—Property water-borne in an enemy's port—Distinction between booty of war and prize of war—Court of Chivalry—Jurisdiction of High Court of Admiralty extended in certain cases over booty of war.

General Right of a Belligerent against enemy's property.

§ 62. WAR being a contention by force with the object either of redressing injury which has been inflicted, or of preventing injury which is threatened, every Nation, which carries on a just war, has a right to take possession of the property of its Enemy, either by way of satisfaction for past injury, or by way of security against future injury. "By Natural Law," says Grotius[1], "we acquire in a just war such things as are equivalent to that which is due to us, and which we cannot obtain in any other

[1] L. III. c. 6. § 1.

manner, or such things as inflict on the offending party a loss, which is within the fair limit of punishment." "A State," says Vattel[2], "taking up arms in a just cause, has a double right against the Enemy. 1. It has a right to obtain possession of the property withheld by the Enemy, to which must be added the expenses incurred in the pursuit of that object, the charges of the war, and the reparation of the damages; for if it were obliged to bear those expenses, it would not fully recover its property or obtain its due. 2. It has a right to weaken its Enemy, in order to render him unable to maintain his unjust violence; a right to deprive him of the means of resistance. Hence, as from this source, originate all the rights, which war gives us over the property of an enemy. On certain occasions this right of punishing an enemy produces new rights over the things which belong to him, as it does over his person."

Regulated exercise of that right.

§ 63. It is lawful, therefore, for a belligerent Power to appropriate to itself the property of its adversary to such an extent, as may be requisite to provide for itself reasonable satisfaction for past injuries, and reasonable security against future injury. The Right to Security will further authorise a belligerent to inflict upon an enemy a loss, with the object of chastising him for his injustice or violence and at the same time furnishing an example to deter others from similar acts of injustice or violence. With this view an enemy may be lawfully deprived of his possessions, or of anything which is calculated to give him strength and ability to make war. But it is not every war that affords just ground for inflicting punishment on an enemy. In cases which admit of doubt, each party is candid and sincere

[2] Droit des Gens, L. III. c. 9. § 160.

in his contention. The arms of each party are to be accounted equally lawful whilst the contest is undecided; and after the cause has been decided by the event of the war against one of the parties, if the vanquished party has observed moderation in the prosecution of his asserted Right, he is entitled rather to compassion than to resentment at the hands of the conqueror. The only circumstance, therefore, which justifies a belligerent in punishing a vanquished enemy is, either the evident injustice of the latter in taking up arms, or his departure from the received practice of Nations in the conduct of the war. Regular war, as to its effects, is to be accounted just on both sides; and the Rights founded on a state of war do not externally and between mankind depend upon the justice of the cause, but upon the legality of the means in themselves[3]. If a belligerent accordingly observes all the rules of regular war, his adversary is not entitled to complain of him as a violator of the Law of Nations in his conduct of the war. Either belligerent has equal pretensions to justice; and neither party has any other resource, when an appeal has been made to arms, than victory or an accommodation. In every case, however, if an enemy has no plausible pretext for taking up arms, or if he conducts his resistance in any manner which should offend against the practice of Nations, he makes himself liable to punishment; but even then the victorious party ought not to inflict upon him a punishment beyond that, which his own security or the general safety requires. Cicero[4] condemns the conduct of his countrymen in destroying Corinth to avenge the indignities shown to the Roman Envoys, inasmuch as Rome was able to assert the dignity of her Ambassadors without

[3] Vattel, L. III. c. 12. § 190. [4] Cic. de Officiis, L. I. c. 11.

having recourse to a measure of such extreme rigour[5].

Right within enemy's territory.

§ 64. As the object of war is to bring about a just peace, a belligerent Nation is justified in invading the territory of the Enemy, and in seizing its goods, its towns, and its provinces, in order to bring it to reasonable conditions, and to compel it to acquiesce in an equitable and firm peace[6]. With this view a belligerent Nation may take possession of the property of the Enemy to an extent far beyond what would be a just indemnification for any injury, which it may have suffered, with the design of restoring the surplus by a treaty of peace.

A belligerent Nation, in taking possession of the property of the Enemy, acquires possession of the Rights, which are incident to that property: for instance, if a belligerent Nation takes possession of an Enemy's territory, it takes possession not merely of the soil and the movable property upon it, but of the Sovereignty over it, and may exercise the latter during such time as it remains in possession of the territory.

Movable property booty of war.

With regard to the property which is found upon the Enemy's territory, all movable property which belongs to Enemy-Subjects is booty (butin) of war, and passes with the territory into the possession of the belligerent; for the actual owners of the property are not distinguishable, as individuals, from the body of the Enemy-Nation, and the actual captors are the trustees of a belligerent Nation in making capture. The rule which governs all captures is expressed by the maxim, *Parta bello cedunt reipublicæ*[7]. "As the towns and land taken from the Enemy," writes

[5] Grotius, L. III. c. 12. § ii. 3.

[6] Vattel, L. III. c. 9. § 163.

[7] The Elsebe. 5 Ch. Robinson, p. 181.

Vattel[8], "are called conquests, all movable property taken from the Enemy comes under the denomination of booty. This booty naturally belongs to the Sovereign making war equally as the conquests, for he alone has such claims against the hostile Nation, as warrant him in seizing the property and converting it to his own use. His soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right." All the movable property, accordingly, of a vanquished enemy, is of *strict right* at the mercy of the conqueror; but this strict right is in practice only enforced on the part of the conqueror, where the Right of Resistance has been maintained to the uttermost by the vanquished party, as for instance where a town has been besieged, and has been formally summoned to surrender on terms, and has refused to surrender, and has been subsequently taken by assault. In such a case the conqueror is justified by the extreme resistance of the adversary in exercising his extreme Right of Conquest, and in seizing, as booty of war, all the movable property of the enemy. It is customary indeed for the Sovereign, or the authority which represents the Sovereign Power of the Nation, to grant to its army a share of the booty taken on such occasions. The mode, however, in which such booty is to be shared amongst its army depends upon the pleasure of the Sovereign Power[9]. In some cases it is customary to give up the whole of the booty to the troops which have taken it; as for instance, where it is the immediate result of a pitched battle, or where a fortified camp or town has been taken by storm: in such cases the actual captors are allowed to gather freely the spoils of their victory.

[8] L. III. c. 9. § 165. Klüber, § 253.

[9] Grotius, L. III. c. 6. § 13. Vattel, III. c. 9. § 164.

On the other hand, where the booty is the ultimate result of a general campaign, it is usual for the Sovereign Power to distribute it amongst all the divisions of the army, which has been engaged in the combined operations of the campaign[10].

Military contributions in lieu of booty.

In cases, however, where the Enemy has surrendered upon terms, it is now the practice among Christian Nations for the Sovereign Power not to seize and confiscate, as booty of war, the private property of individual citizens, but either to content itself with making prize of all the public property of the Enemy-Nation, which is of a movable character, such as jewels, or treasure, or instruments of war, or military stores; or in case it should assert its Right of Conquest over the private property of enemy-citizens, to limit itself to levying upon them a Contribution of money or provisions, in consideration for which their actual property is guaranteed from pillage. But the commander of a victorious army must, under such circumstances, be moderate in his demand of Contributions, if he wishes to escape the reproach of inhumanity and greediness[11].

§ 65. The exercise of the Natural Right of a belligerent to ravage the Enemy's territory, with the exception of those cases in which the conduct of the Enemy has merited special chastisement, is governed by the maxim that nothing is allowable against an enemy but what is necessary, and nothing is necessary which does not tend to procure victory and bring the war to a conclusion. All damage therefore which is done to an enemy without any corresponding advantage accruing to the belligerent is an abuse of the Natural Right of the latter. Thus indeed a belligerent is entitled to capture all the property of an enemy

[10] The Army of the Deccan. 2 Knapp's Reports, p. 114.
[11] Vattel, L. III. c. 9. § 165.

which is calculated to enable him the better to carry on hostilities, and if he cannot carry it away conveniently, to destroy it. A belligerent, for example, may destroy all existing stores of provisions and forage, which he cannot conveniently carry away, and may even destroy the standing crops in order to deprive his enemy of immediate subsistence and so reduce him to surrender. But a belligerent will not be justified in cutting down the olive trees, and rooting up the vines; for that is to inflict desolation upon a country for many years to come, and the belligerent cannot derive any corresponding advantage therefrom[12]. When the French armies desolated with fire and sword the Palatinate in 1674, and again in 1689, there was a general outcry throughout Europe against such a mode of carrying on war; and when the French Minister Louvois alleged that the object in view was to cover the French frontier against the invasion of the Enemy, the advantage which France derived from the act was universally held to be inadequate to the suffering inflicted, and the act itself to be therefore unjustifiable. A belligerent Prince who should, in the present day, without necessity, ravage an Enemy's country with fire and sword, and render it unhabitable, in order to make it serve as a barrier against the advance of the Enemy, would justly be regarded as a modern Attila. The necessity of war has occasionally justified Princes in laying waste their own provinces in order to raise a barrier against an enemy, whom they could not otherwise hope to check. For instance, Peter the Great laid waste an extent of eighty leagues of his own Empire with a view to check the advance of the troops of Charles XII. of Sweden. The Swedes were accordingly worn down with want and fatigue in their advance, and the victory of

Destruction of military stores and provisions.

Devastation of crops.

[12] Vattel, L. III. c. 9. § 166.

Pultowa was gained by the Czar as the result of the sacrifice. There may be cases, therefore, when necessity will justify similar extremities in an Enemy's country; but such instances will be of rare occurrence, and may be regarded as exceptional.

Immovable property of enemy-subjects.

§ 66. With regard to the immovable property of enemy-subjects, there was a time when the lands of enemy-subjects were confiscated by the victor, just as the right of the victor over the person of a prisoner of war was absolute and unlimited[13]. But the right of a victor to use his prisoners of war as slaves has ceased to be exercised since the middle of the seventeenth century[14]; and it may be said to have become the universal practice of Christian Powers, since the Treaty of Munster, (30 Jan. 1648,)[15] to release all prisoners at the end of a war without ransom[16]. So likewise the landed and immovable property of private individuals is in general by the positive law of Nations not liable to confiscation by a victorious Enemy[17]. A victorious Nation on the other hand enters upon the public rights of the vanquished Nation, and the National domain and the National treasure pass to the victor[18]. He may dispose of the National domain at the risk of the purchaser, in case the vanquished Nation should recover possession of its dominions: for it is only by a treaty of peace, or by the entire

[13] Vattel, L. III. c. 7. § 1.

[14] At the commencement of the seventeenth century we find many treaties of peace, in which it was stipulated that prisoners of war should not be sent to the galleys.

[15] Dumont, Traités, Tom. VI. Pt. 1. p. 434.

[16] There was a special provision in the Treaty of Amiens (1802) concluded between Great Britain on the one hand, and the French and Batavian Republics on the other, that the prisoners on both sides should be released without ransom. This provision may have been rendered necessary by the previous conclusion of a cartel for the ransom of prisoners at fixed money prices.

[17] Manning, c. 8. p. 162.

[18] Vattel, L. III. c. 12. § 200. Martens, Précis, § 280. Klüber, § 256. Wheaton, Pt. IV. c. 11. § 5.

submission of and extinction of the vanquished Nation, that the acquisition of its public domain by the victor is consummated, and his proprietary right made perfect. A neutral Power cannot lawfully step in and purchase a conquered country, while the war continues; for it is inconsistent with neutrality for him to furnish a victorious belligerent with money to enable him to prolong the war; and if he should take possession of his purchase and maintain it against its original owner, he would be aiding his adversary. Thus the King of Prussia became a party with the enemies of Sweden by accepting Stettin from the hands of the King of Poland and the Czar of Russia[19] under the Convention of Schwedt (6 October 1713,) after they had captured it from the Swedes, and by consenting to hold it as sequestrator, until peace should be concluded. The conduct of the King of Prussia, which was inconsistent with a just neutrality, involved him, not long after he had so taken possession of Stettin, in hostilities with Sweden. But when a conquered Nation has by a definitive treaty of peace ceded a country to the conqueror, the former has relinquished all right to it, and the new occupant has an indefeasible title to it, which he may transfer to a third party. A victorious Nation, in acquiring the sovereignty *de facto* over a country, from which it has expelled its adversary, does not acquire any other rights than those which belonged to the expelled Sovereign; and to those, such as they are with all their limitations and modifications, he succeeds by Right of War. It is accordingly usual in treaties of peace by which a territory, which has been occupied by a victorious Nation, is formally ceded to it, for the vanquished Power to stipulate that the inhabitants shall retain all their

[19] Vattel, L. III. c. 13. § 198. Schoell, Histoire Abrégée des Traités de Paix, Tom. IV. p. 213.

liberties and immunities; and as those liberties and immunities are the creatures of civil law, it is not uncommon to stipulate that the civil law of the conquered people shall be maintained, the victor being at liberty to introduce his own criminal law. Thus when the Dutch Colony of Cape Town surrendered to the British fleet in 1795, it was stipulated in the articles of Capitulation that the Dutch Law should continue to furnish the rules for interpreting all civil contracts and obligations; in other words, that the proprietary rights of the inhabitants should be regulated by the same law as heretofore.

State Papers and Public Archives.

§ 67. There is a class of movable property belonging to an Enemy which is exempt from capture and confiscation by a belligerent Power, such as State papers, public archives, judicial and legal records, land titles, &c. Such property is regarded as adhering to the Sovereignty of the country, and passing with it, and is as it were an appurtenance of the National domain. When a belligerent Nation takes possession of an Enemy's country, it sequesters the rents of the immovable domain, but it cannot rightfully alienate the domain itself. It is not until peace has been concluded, and the conqueror's title has been recognised by the vanquished, that the public domain becomes at the absolute disposal of the conqueror. So likewise with regard to all movable articles, which appertain to the Government of a country, and over which the Sovereign for the purpose of government has full dominion, they are at the absolute disposal of the conqueror for the purpose of government, whilst he is in possession of the country, but in practice they are not booty of war. They are in the nature of public proofs or evidences of Rights; and as in the case of private debts, the mere fact of the conqueror possessing himself of the

documents relating to incorporeal Rights, does not give to him the possession of the Rights themselves; so the possession of public documents is a possession barren of fruit to the conqueror, for his rights, as derived from force of arms, are simply those of *de facto* possession. A belligerent who should permit his troops to plunder or destroy the public archives of the Enemy Nation, or who should capture and carry away, as booty of war, State papers or judicial and legal records, would carry on war in a manner not sanctioned by the modern practice of Nations. The plunder and destruction of public archives cannot in any way profit a belligerent, or promote the true object of war. On the contrary, their plunder and destruction is calculated to exasperate an Enemy Nation, as being an unnecessary injury inflicted upon it; whilst the loss of public documents, which are the basis and evidence of private property, may work infinite prejudice to innocent parties. For the same reason it would be an act of wanton barbarism for a belligerent, who is compelled to evacuate an enemy's country, to carry away the public archives, and to attempt to sever them from the Sovereignty.

Public Libraries and Museums.

§ 68. With regard to Public Libraries and Collections of works of Art, such as pictures, statues, and other forms of sculpture, there is not the same agreement amongst text-writers, that a belligerent is restrained by practice from seizing and carrying them away as booty of war. All writers indeed are of accord, that to destroy such works wantonly would be to violate the modern usage of war[19]; but they do not agree in holding that it is inconsistent with the usage of war to carry off such works as booty. The French armies, in the wars

[19] Kent, Commentaries, Vol. I. p. 93. Klüber, § 253. Vatte L. III. c. 3. § 168.

which attended the Revolution of 1789, carried off all the finest works of genius and taste which they found in Italy, Holland, and other enemy-countries, and which were of a movable character. In some cases they obtained them by means of forced Contributions, in other cases by express Conventions with the conquered States. Upon the victorious entry of the Allied Powers into Paris in 1815, they found those treasures of Art collected together in the various galleries of the Louvre and other Museums. It appears from a note delivered in by Viscount Castlereagh to the Ministers of the Allied Powers, and placed upon the Protocols of Paris (11 Sept. 1815), that the Pope, the Grand Duke of Tuscany, the King of the Netherlands, and other Sovereigns, "claimed through the intervention of the High Allied Powers, the restoration of the statues, pictures, and other works of Art, of which their respective States had been successively and systematically stripped by the late Revolutionary Government of France, contrary to every principle of justice and to the usage of modern warfare[20]." Lord Castlereagh, on this occasion, placed on record the opinion of Great Britain, that works of Art have been invariably respected by modern conquerors, as inseparable from the countries to which they respectively belonged; and that to tear them away from the territories to which they appertained was a reproach to the Nation, which had adopted such a principle of war. The French Commissioners on the other hand, who concluded the military Convention under which the Allies took possession of Paris, appear to have considered that the Allies might with justice claim to exercise their right, as belligerents, to strip in the same manner the galleries of Paris of their spoils, as

The Gallery of the Louvre in 1815.

[20] Martens, Nouveau Récueil, T. II. p. 632.

the French armies had exercised their right of spoliation in the countries which they had overrun; for they proposed to introduce into the Convention an article, which should secure to France the treasures of Art which she had amassed. But Prince Blucher would not assent to it on behalf of Prussia, and the Duke of Wellington rejected it in the interest of the other Powers. The Duke of Wellington was of opinion "that the Allies having the contents of the Museum justly in their power, could not do otherwise than restore them to the countries from which, contrary to the practice of civilised warfare, they had been torn during the disastrous period of the French Revolution and the tyranny of Bonaparte[21]." The Allied Powers acted upon this view of the Rights of War, and their conduct may be regarded as a practical affirmation on their part of the principle, that Public Collections of works of Art are not booty of war according to the modern usage of civilised Nations. American writers on Public Law are not altogether of accord with European publicists on this subject. Mr. Wheaton does not pronounce any decided opinion, but is content to quote a speech of Sir Samuel Romilly in the House of Commons on 20th Feb. 1815, expressive of his dissatisfaction with the conduct of the Allied Powers in 1815[22], as not altogether consistent with justice. The tendency however of Mr. Wheaton's remarks is in favour of the milder practice[23]. General Halleck on the other hand maintains that an impartial judge must conclude, on a careful examination of the circumstances connected with the formation and

Opinion of the Duke of Wellington.

[21] Despatch of the Duke of Wellington to Viscount Castlereagh. Paris, Sept. 23, 1815. Martens, N. R. II. p. 642.

[22] Wheaton, Elements, Part IV. c. 2. § 6.

[23] Hansard's Parliamentary Debates, Feb. 20, 1815. Life of Romilly, Vol. II. p. 404, and Halleck, International Law, c. 19. § 10.

spoliation of the rich Museum of the Louvre, either that such works of Art are legitimate trophies of war, or that the conduct of the Allied Powers in 1815 was in direct violation of the Law of Nations. It is impossible, he says, to avoid one or the other conclusion. A British Court of Prize has however administered in the case of American interests the Law of Nations in the same liberal spirit, in which Lord Castlereagh expressed the feeling of the British Government. In the case of a collection of Italian paintings and prints captured by a British vessel during the war of 1812, on their passage from Italy to the United States, the learned Judge (Sir Alexander Croke)[24] of the Vice-Admiralty Court at Halifax, directed them to be restored to the Academy of Arts in Philadelphia, on the ground that the Arts and Sciences are admitted amongst all civilised Nations to form an exception to the severe rights of war, and to be entitled to favour and protection. They are considered not as the *peculium* of this or that Nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the Law of Nations, as practised by all civilised countries."

Decision of British Prize Courts.

Public Edifices.

§ 69. The modern practice of warfare exempts from wanton destruction Public Edifices, which do honour to human society and do not increase the enemy's strength, such as religious edifices, public monuments, repositories of art and science, hospitals, and charitable institutions; in a word, all public structures devoted exclusively to civil purposes.[25]

[24] The Marquis de Somerueles. Stewart's Vice-Admiralty Reports, p. 482 (21 April 1813).

[25] Vattel, L. III. c. 9. § 168. Grotius, L. III. c. 12. § ii. 3.

There may be cases in which the destruction of such buildings may be the accidental or necessary result of military operations. But it is usual even in siege operations for the beleaguering party to avoid directing the fire of his artillery against the churches and hospitals of the besieged town. Amongst heathen Nations what were called *res sacræ* were not exempt from capture and confiscation; but the contention of the worshippers of Heathen Deities was supposed to involve a conflict between the Deities themselves; or in cases where the belligerent parties worshipped the same Deities in common, the Deities were held to have abandoned the temples of the vanquished Nation at the moment when victory declared itself in favour of the adverse party. Cicero has well expressed the sentiment of the heathen world, when he says that victory made all the sacred things of the Syracusans profane[26]. But a Christian Enemy in the present day respects the mosques of the followers of Mahomet and the temples of the votaries of Buddha, as edifices of religion, equally with the churches of the believers in Christ, in which he himself worships. So likewise with regard to public edifices of a civil character, if modern usage has sanctioned their destruction without necessity, it has been by way of vindictive Retorsion or Reprisals. Thus, when the British forces in 1814 destroyed the Capitol, the President's house, and other public edifices at Washington, the justification of the act was rested by the British Admiral on the ground of retaliation for the wanton destruction committed by the troops of the United States in Upper Canada. The correspondence between Mr. Secretary Munroe[27] and

Destruction of the Capitol at Washington in 1814.

[26] Cicer. Orat. in Verrem 4.

[27] American State Papers, T. III. pp. 693, 694. Wheaton's Elements, part IV. c. 2. § 6.

Admiral Cochrane on this subject, is interesting and instructive, for it shows that both parties considered such acts of devastation as *abnormal*, and as involving a departure from the ordinary practice of civilised warfare. It is to be regretted that Great Britain retaliated *in kind* on this occasion, for the *lex talionis* is not the rule of modern warfare; and if one of the belligerent parties should have placed itself in the wrong by having recourse to exceptional measures, the balance cannot be redressed in the right manner by the adversary having recourse to identical measures, and so placing himself *in pari delicto*. When Prince Blucher proposed to blow up the Bridge of Jena, and to overthrow the Column of Austerlitz upon the Allied Powers entering Paris, he sought to retaliate upon the French Nation the acts of wanton destruction and desolation, which they had inflicted upon the Prussian Nation; but the Allied Powers wisely and prudently withstood Prince Blucher's desire. An example of a wiser practice was shown by the Emperor Francis of Austria in regard to the Arch of the Simplon, which Napoleon had erected in Milan to commemorate his victories over the Austrians. The history of those victories was given in a series of bas reliefs, the last of which represented Napoleon dictating peace to the Emperor Francis in Vienna. The Emperor Francis directed the historical series of bas reliefs to be completed, and opposite to the bas relief representing the Emperor Napoleon dictating peace to the Austrians at Vienna, the Arch at present exhibits a bas relief representing Napoleon's subsequent abdication at Fontainebleau.

Arch of Simplon.

Property water-borne in an enemy's ports.

§ 70. There is a class of movable property belonging to an Enemy, which whether it be of a public or private nature, is invariably treated as

booty of war, if it is found within the territory of the Enemy. Whatever moderation may be exercised towards private property on land by a victorious belligerent, the extreme right of seizure and confiscation is exercised by him against the shipping which may be found within an enemy's ports. M. de Hautefeuille observes, in explanation of the exercise of the extreme Right of a belligerent in this particular, that mariners are the hardiest and most courageous portion of the population of a country, and that ships are calculated to become instruments of warfare, or at least to serve the purposes of war. The capture and destruction of such property has accordingly a direct tendency to impair the military power of the enemy and to reduce him to the necessity of making peace. It would be therefore a questionable act of humanity to proscribe the destruction of it. The same reason however does not tell so forcibly in support of the capture and confiscation of the cargoes, which are afloat in ports and are the property of private citizens. The explanation of the difference in the practice of belligerents in confiscating private property which is afloat, whilst the private property of Enemy-Subjects on land is spared, may be sought in the fact, that such property is at the time of capture actually employed in promoting the Enemy's commerce and navigation, which are justly regarded as the sources and sinews of his naval power, and that the destruction of the latter can only be brought about effectually by the capture and confiscation of such private property, seeing that the State rarely, if ever, embarks in enterprises of commerce[28]. It is upon similar considerations that a cargo belonging to enemies and found afloat in the port of a belligerent Nation at the breaking out of war is confiscable

[28] Wheaton, Elements, part IV. c. 2. § 7.

jure belli, whilst an enemy's property on land is not, according to the modern practice, liable to confiscation.

Distinction between booty and prize.

§ 71. With regard to enemy's property captured on land, and which is properly termed *booty* of war, a different Forum exercises jurisdiction over it from that which decides upon all questions of captures at sea, which are properly termed *prize* of war. The latter has devolved to the Courts of Admiralty, by virtue of the jurisdiction exercised in olden times by the Lord Admiral of the Fleet, whilst the former appertains to that branch of the military jurisdiction exercised by the Commander-in-Chief of an Army in the field. Courts of Admiralty accordingly take no cognisance of questions of booty. In very early times in England, causes respecting booty were determined in the Court of Chivalry, before the Constable and the Marshal of the King. Lord Hale[29] observes that in matters civil, for which there is no remedy by the Common Law, the military jurisdiction continues as well after the war as during the time of it; for that part of the jurisdiction of the Constable and the Marshal stands still, notwithstanding the war determines, as concerning right of prisoners and booty, military contracts, &c. We find accordingly that the Court of Chivalry took cognisance of goods taken beyond the seas, of prisoners, of hostages, of ransom, &c.; and the statute of 13 Richard II. c. 2, in limiting its jurisdiction to contracts and things touching war which cannot be determined by the Common Law, directed its proceedings to be governed by the laws and customs of war. After the office of Lord High Constable of England ceased in the thirteenth year of Henry VIII. the jurisdiction of the Court of Chivalry came to be

Court of Chivalry.

[29] De Prærogativa Regis, c. 12. § 3. Crompton on the Jurisdiction of Courts. Rymer, Fœd. VIII. p. 211 and 423.

disputed on the grounds that the Earl Marshal alone was not competent to hold the Court, and it seems ultimately to have fallen into desuetude[30]. The last case heard before it was that of Sir Henry Blunt in 1737[31]. The modern practice in England in respect of the distribution of booty of war, is for the Crown to refer the claims of those, who petition for a share of the distribution, to the Lords of the Treasury, who under the advice of the Law Officers of the Crown, settle a scheme of distribution for the approval and sanction of the Crown itself[32], as all acquisitions of war belong of Right to the Crown, *parta bello cedunt reipublicæ*[33]. A Statute, which was passed in 1840[34], extends the jurisdiction of the High Court of Admiralty of England to all matters and questions concerning booty of war or the distribution thereof, which it shall please the Crown, by the advice of the Privy Council, to refer to the judgment of that Court; and in all matters so referred the Court is to proceed as in cases of prize of war, and the judgment of the Court therein is to be binding upon all parties concerned. The High Court of Admiralty may accordingly under this Statute, exercise a jurisdiction in cases of booty, apart from, but analogous to, its jurisdiction in questions of prize, with this difference however, that whilst it has a customary jurisdiction over all questions of prize, it can only exercise its statutory jurisdiction over such questions of booty, as the Crown, with the advice of the Privy Council, may be pleased to refer to its judgment.

Extension of the Admiralty Jurisdiction over booty.

[30] Lindo *v.* Rodney, 1 Douglas, p. 593. The Army of the Deccan, 2 Knapp, p. 149.

[31] Sir H. Blunt's case, 1 Atkyns, p. 296.

[32] The Army of the Deccan, 2 Knapp, p. 106. Buenos Ayres, 1 Dodson, p. 28. Elphinstone *v.* Bedreechund, 1 Knapp, p. 360.

[33] The Elsebe, 5 Ch. Rob. p. 181.

[34] 3 and 4 Vict. c. 65. § 22.

CHAPTER V.

RIGHT OF A BELLIGERENT ON THE HIGH SEAS.

The Maritime intercourse of Nations subject to special rules in time of War—Object of war—Enemy's property on the High Seas—Institution of the Office of Admiral—Establishment of an Admiralty Jurisdiction of Nations—Order of Prize Proceedings recognised by Treaties—The Judgments of the Sea—The Customs of the Sea—General Rule amongst Nations down to the middle of the Sixteenth Century to distinguish the Ship from the Cargo—Règlement of Francis I. of France in 1543—Edict of 1584—French doctrine of Hostile Infection—Ordonnance de la Marine of 1681—Spanish Ordenanza de Corso of 1718—French Règlement of 1778—Law of the French Prize Courts down to 1854—Sir William Grant—Rule of the United States of America—Wheaton—Chancellor Kent—Bynkershoek—Freight of enemy's goods upon capture payable to neutral shipowners—Measure of freight—The Grand Pensionary de Witt, founder of the doctrine of Free Ships, Free Goods—Treaty of Paris of 1646—Dutch Treaties with Spain and Portugal—British Treaties with Portugal and the States General—Treaties of Utrecht in 1713—Armed Neutrality of 1780—Four systems of Maritime Prize Law—The Natural system of the Consolat del Mar—The French system of the Ship and Cargo mutually infecting each other—The Dutch system of the Cargo following the character of the Ship—The System of the Congress of Paris as embodied in its Declaration of 16 April 1856, that the Neutral Flag covers the Cargo—Adhesion of all the European Powers to it, with the exception of Spain—Spain and Mexico have adopted the principles embodied in the last three articles of the Declaration, as part of their own legislation—The United States of America have declared their intention to observe the three last articles—Accession of the South American States

to the Declaration of Paris—Protocol No. 24. annexed to that Declaration—Territorial Theory of Hübner—Doctrine of Martens—Bynkershoek's and Lampredi's Objections—Manning's Refutation of Hübner's Theory—The Passport, the true criterion of a ship's national character—The Sea Letter—It is conclusive of the national character of a merchant ship—Belligerent right of visitation and search—Case of the Swedish Convoy—Vattel—Chancellor Kent—Convention of the Baltic Powers in 1801—Wheaton—Right of Approach—Regulation of the right of visitation and search—Rule of an Affirming Gun—Lampredi's view—Mr. Justice Story's opinion—General Halleck—Sir Robert Phillimore—Heffter—Treaty of the Pyrenees—Practice of Nations as to ship's papers—Builder's Contract or Bill of Sale—Certificate of Registry, if required by Municipal Law—Necessary cargo-papers—Ship's manifest and bills of lading—Charter-party—Absence of ship's papers or of cargo papers justifies the detention of a vessel for enquiry—Right of Detention—Neutral merchant vessel may not sail under convoy—Chancellor Kent—Wheaton—A neutral merchant may not embark his goods in an armed ship of the enemy, according to the judgment of the British Prize Courts—The Prize Courts of the United States in conflict with British Prize Courts on this subject.

Maritime intercourse of nations.

§ 72. THE open Sea is not capable of being reduced into the possession of any Nation, and accordingly can never become part of the territory of a Nation. There is therefore no juridical objection *ratione loci* to a Nation freely prosecuting its Right by force against another Nation upon the open Sea. On the other hand, all Nations are entitled to the free use of the open Sea for the purposes of innocent Navigation; and no Nation can claim with reason to prosecute its Right by force against another Nation upon the open Sea in such a manner, as to interfere with the innocent Navigation of it by other Nations, which are not parties to the contention. It is obvious, however, when two Nations are contending by force in the prosecution of Right, that their relations, as belligerents, will differ essentially from the relations of

Nations which are at peace with one another; and in order that the Navigation of the open Sea by other Nations at such a time should have an innocent character, it must be so conducted as not to work any prejudice to the contention of either belligerent, as such. The conditions, therefore, under which Nations may innocently navigate the open Sea in time of war, will differ very materially from the conditions under which they may so navigate it in time of peace; and although there may be no conflict of principle between those conditions, the reason of the thing suggests that the maritime intercourse of Nations in time of war will be governed by very different rules from those which prevail in time of peace.

Object of war.

§ 73. The primary object of War being the reparation of damages, War for the most part implies Reprisals against the property of an enemy. But War differs so far from Reprisals, that whereas the latter are grantable against the ships and goods of an enemy *ad damni dati modum et damnorum consequendorum causa*, and all Reprisals, as distinguished from War, cease, when full satisfaction has been obtained; War, on the other hand, may contemplate, in addition to redress, the punishment of injustice or violence, and the taking of security against future injury, by depriving an enemy of some part of his property or possessions. Again War may be undertaken to prevent injustice or violence; in which case there will be no place for Reprisals as such, but the belligerent will be entitled of Natural Right to deprive his enemy of everything which tends to augment his strength and to enable him to do injustice or violence. Every belligerent endeavours to accomplish this object in the manner most suitable to himself; and whenever an oppor-

tunity presents itself, he takes possession of the property of his enemy and confiscates it to his own use, thereby diminishing his enemy's power to carry on the war, whilst he secures at the same time to himself an equivalent for the expenses and losses incurred in the prosecution of it[1]. The movable property equally with the houses and lands of an Enemy-Nation is accordingly liable to be taken by a belligerent and confiscated to his own use, not merely when such movable property is found within the territory of an enemy, but when it is found on the High Seas, there being no juridical impediment *ratione loci* to a belligerent seizing the property of his enemy in a place which is *nullius territorium*. If a belligerent cruiser accordingly meets a merchant vessel on the open Sea, and the vessel or its cargo belongs to an enemy, it is consistent with the primary object of all war, that the belligerent should do justice to himself by taking possession of his enemy's property and converting it to his own use. Property so taken by a belligerent from an enemy on the high sea is termed prize (prise) of war, whilst property taken from an enemy on land is termed booty (butin) of war[2]. No juridical difficulty can arise, when the property of an enemy found on the high sea is not mixed up with the property of a neutral; but it may happen in the case of a ship and its cargo, that the ship itself is the property of several owners, one or more of whom are the subjects of a Neutral Power; or the vessel may be the property of a neutral merchant and the cargo the property of an enemy; or the vessel may be enemy's property, and the cargo neutral property; or the cargo may be

Enemy's property on the high seas.

[1] Vattel, L. III. c. 161.

[2] The French word *Butin* is supposed to be a diminutive of the Low-German word *Bute*. Cf. Dictionaire de Trevoux.

owned in part by an enemy and in part by a neutral. When movable property is found in the territory of an enemy, the *locus in quo* determines the right of a belligerent to take possession of it, for everything which is in the territory of an enemy is *primâ facie* appurtenant to his territory, *Quicquid est in territorio est de territorio;* but as the open Sea cannot become the territory of any Nation, no similar rule can determine the right of a belligerent to take possession of a ship or its cargo on the open Sea, and the ownership of the property thus becomes the test of its liability to make good the damages and expenses of the belligerent, and of his right to take possession of it.

The office of Admiral.

§ 74. If we go back to the early Laws of the Sea, we find the juridical distinction taken between armed vessels and merchant vessels. An armed ship might be simply navigating the high sea or cruising (en course). If an armed ship was cruising, she was engaged in making reprisals or in making war, the expression originally made use of in Letters of Marque being the same as in the ancient formulary of declaring war, which enjoins all subjects *courir sus à l'ennemi.* But this expression was borrowed from an earlier state of things, when the police of the High Seas was maintained by voluntary associations amongst merchants. In the state of wild anarchy, to which the navigation of the High Seas was subject after the breaking up of the Roman Empire, when the Norman sea-rovers infested the North Sea and the Baltic, and the Saracens and Greeks covered the Mediterranean Sea with piratical vessels, every merchant ship navigating the High Seas with a valuable cargo was liable to pillage. It was in vain for the plundered trader to prefer his complaint to the Sovereign of the country, from

which the piratical vessels had been fitted out; the Sovereign was either too feeble to do justice upon the criminals, or was conniving at their crimes. Merchants accordingly were obliged to associate themselves together for mutual protection; and their vessels sailed forth in fleets, of which a chief was elected, called the Admiral. The rule of these Associations was in the first place mutual defence, and secondly joint participation in all prize, which might be made in the conduct of such mutual defence. Every vessel of a fleet was bound to obey the Admiral, not merely as a leader in battle, but as a judge in dividing the prize made from the enemy; and the usages of such Associations in their expeditions against pirates, for they fitted out at times fleets of armed vessels expressly to cruise after pirates (*per la guerra del corso*), came by degrees to be the usages of Nations in their warfare on the High Seas. Such a result seems to have been brought about in this manner. Independent Princes were fain to enlist into their service the armed fleets of these voluntary Associations, when the occasion presented itself of attacking an enemy by sea, or the necessity arose of defending themselves against any attack by sea. Thus there was a mercantile Association at Pisa, called the *Umili*, which was constituted after the likeness of an independent State[3], waging war and making conquests with a military marine of its own. It lent its powerful aid to the Princes of Austria in A.D. 1188, and obtained from them in return special privileges for the Company[4]. But in enlisting the

[3] The British East India Company was a striking instance in modern times of a voluntary association of merchants exercising, amongst other attributes of an independent State, the right of making war and peace.

[4] Muratori Antiq. Ital. Medii Ævi, Tom. II. col. 910 et seq. Pardessus, Tom. II. Introduction, p. 127.

services of the armed fleets of this and other Merchant-Associations, Sovereign Princes found it both necessary and expedient to allow them to observe the rules to which they had been accustomed to conform themselves, in the conduct of their own maritime expeditions, more particularly as those rules were based for the most part upon principles of Natural Right; and thus the sanction of Nations, as such, was given by degrees to the maritime usages of these Merchant-Associations, and so they became the Customary Law of the Sea.

Admiralty Jurisdiction of Nations.

§ 75. The necessity for these voluntary Associations of merchants continuing to maintain the police of the High Seas by armed fleets, equipped at their own cost, and subject to an Admiralty jurisdiction of their own, ceased by degrees, according as Sovereign Princes took upon themselves the duty of exercising a Supreme Admiralty jurisdiction, which in the course of the thirteenth century came to be considered amongst the leading States of Europe to be a Prerogative of Sovereign Power. In the fourteenth century we find a custom growing up for Sovereign Princes to restrain their Subjects from doing justice to themselves on the High Seas, unless there should have been previously granted to them Letters of Marque and Reprisal; and in the fifteenth century it may be said to have become established Law, as between Nations, that an armed cruiser should be furnished with Letters of Marque or with Letters Patent under the seal of a Sovereign Prince in the nature of a Commission, in order that it should be entitled of Right to make Reprisals or War. The terms upon which these Letters of Reprisal and Commissions to make War were grantable, required, that whatever was taken by an armed cruiser should be brought to open judgment in the Admiral-Court,

and thus the Admiral-Court came to be an International Court of Prize, and the rules which had been adopted for the regulation of maritime warfare, whilst it was carried on by the voluntary Associations of merchants under the control of an Elective Admiral, came to be the rules of maritime warfare between Nations, and the Law, which the High Courts of Admiralty administered in questions of Prize taken upon the High Seas. The process of these Courts was framed after the best models which the Roman Law afforded; and the regulations for prize proceedings of the fifteenth century are identical with the practice of the present time. The observance of one uniform system amongst Nations was confirmed by treaties, the articles of which were of a declaratory character; and amongst these the Treaty of Boulogne[5], concluded between Charles VIII of France and Henry VII of England, on 24 May 1497, is most deserving of notice, as being a complete exposition of the prize proceedings of those times[6].

Order of prize proceedings.

§ 76. One of the most ancient collections of the Customs of the Sea[7] is contained in the Book of the

Customs of the Sea.

[5] Robinson, Collectanea Maritima, p. 83. Dumont, Traités, Tom. III. Part I. p. 376.

[6] The tenth article of this treaty provides, that the Municipal Courts shall be restrained from interfering with the free action of the Admiralty Court in matters of prize.

[7] The two most ancient known MSS. of the Customs of the Sea are preserved in the Bibliothèque Nationale in Paris. They are in the ancient Catalan tongue, and the earlier part of one of them is in a handwriting of the fourteenth century, and it is written on paper of the fourteenth century. There is a certificate in the later of the two MSS. attested by the Scribe of the Consulate of the Sea at Barcelona, and verifying its contents. The Bibliothèque Nationale also possesses the only known copy of the Editio Princeps of "Lo Libre de Consolat del Mar," which is also in the Catalan tongue, and was printed in Barcelona in 1494. A full account of the Barcelonese MSS. and of the Editio Princeps of 1494 is given in the Introduction to the Black Book of the

Consulate of the Sea, which was compiled in the fourteenth and fifteenth centuries for the use of the Consuls of the Sea at Barcelona. The Judgments of the Sea[7], or as they are more commonly designated the Judgments of Oleron, are of an earlier date, as there are historical traces of them in the middle of the thirteenth century, if there is not historical certainty of their having been compiled in the latter part of the twelfth century.

The Judgments of the Sea, however, are concerned only with matters of trade in time of peace, whereas the Customs of the Sea contain several chapters, that treat of questions between the armed vessels of belligerents and the trading vessels of neutrals[8], as well as of questions arising between the owners of

Admiralty. Appendix, Vol. III. p. 34.

[7] The two earliest known MSS. of the Judgments of the Sea are preserved in the Archives of the Guildhall of the City of London. They are in the Anglo-Norman tongue, written on parchment, and in an early handwriting of the fourteenth century. The text of both these MSS. consists of twenty-four articles, which are identical with the articles of the Laws of Oleron, that form part of the text of the Black Book of the Admiralty. A Castilian version of these Judgments under the title of "El Fuero de Layron" exists in a MS. of the fifteenth century, preserved in the Library of the Escurial in Spain, from which it appears that the fifth part of the Siete Partidas of Alphonso X of Castile, which was completed in 1266, was framed upon the model of these Judgments. Many writers of eminence have been misled by Cleirac's work on "Les Us et Coustumes de la Mer," to confound the ancient Judgments of the Sea with a version of them, consisting of forty-six articles, which was published for the first time in the early part of the sixteenth century by Pierre Garcie, alias Ferrande, in Le Grant Routier de la Mer, and which Garcie professed himself to have extracted "du très utill et profittable Roolle Dolayron," and under that misapprehension they have erroneously assigned to the Judgments of the Sea an origin comparatively modern and more recent than that of the Book of the Consulate of the Sea.

[8] Ch. 231. Of a merchant ship taken by an armed ship. Ch. 243. If a ship of merchandise meets with a ship of an enemy. Ch. 245. Of a ship captured and recaptured. Black Book of the Admiralty, Appendix, Vol. III. pp. 539, 601, 611.

ships and the owners of cargoes, incidental to the exercise of the Rights of War by belligerents on the High Seas. These Customs of the Sea were an important branch of the Law, which the Consuls of the Sea were directed under Royal Ordinances, issued on several occasions in the earlier part of the fourteenth century, to administer in the various maritime Courts within the dominions of the Kings of Aragon, and they are of much higher antiquity than the Book of the Consulate itself, in which they have been handed down to our time, precisely as the Laws of Oleron are of much higher antiquity than the Black Book of the Admiralty of England, in which they are inserted. We may account for the appearance amongst these Customs of several chapters on questions appertaining to maritime warfare by the twofold consideration,—first, that the system of maintaining the peace of the high seas against piratical vessels by cruisers fitted out by voluntary associations of merchants was first organised effectively in the maritime cities on the shores of the Mediterranean, and secondly, that there was a permanent State of War upon the waters of the Mediterranean between the Christian and the Saracen corsairs[9], the conduct of which it had been found expedient by both parties to place under some regulations. Thus Fanucci[10] cites an example of a date as early as A.D. 1164, from which it would appear that the Right of Visitation and Search was recognised at that time both by Christian and by Mahommedan Powers, as a belli-

[9] The term Corsair was originally applied as a generic term to any vessel fitted out *per la guerra del corso*. In later times its use has been confined to vessels engaged in predatory warfare, such as was waged by the Barbary Corsairs against all Christian traders.

[10] The documents cited by Fanucci are referred to in Pardessus, Lois Maritimes, Tom. II. Introduction, p. 122. The chapters on Cruisers of War are inserted in Tom. V. p. 396.

gerent Right in regard to Neutrals; and we find in the chapters on Cruisers of War which are inserted in the Book of the Consulate, immediately after the Customs of the Sea, as well as in other Sea-Laws of the fourteenth century, express regulations as to the incidents of battle with Saracen enemies.

Distinction of ship from cargo.

§ 77. Looking then to the Customs of the Sea, as containing the traditions of the early jurisprudence of the Middle Ages in regard to belligerent and neutral rights on the High Seas, we find that in the fourteenth century, in order to reconcile the free action of a belligerent against the property of an enemy with the respect due to the property of a Neutral Subject, a rule had become established under which neutral property, although laden on board of an enemy's ship, was not subject to confiscation upon the capture of the ship; and reciprocally a neutral ship laden with enemy's goods was to be restored to its owner, upon the delivery of its cargo to the belligerent captor. As the primary object of war is to work Corrective Justice by exacting compensation for damage which has been inflicted, the mode by which a belligerent Power brings about this result is by seizing the goods not only of the actual wrong-doer, if they can be met with at sea, but also the goods of other subjects of the Sovereign Prince, who, as such, ought to control the conduct of the actual wrong-doer and constrain him to make reparation; and thereupon either detaining them as a security until justice is done, or confiscating them as an equivalent for the loss which has been sustained. The action of a belligerent, accordingly, in seizing ships[11] or their cargoes on the High Seas, should in reason and justice be

[11] Statute of Marseilles, L. II. c. 30. Cf. Ducange, Glossarium, vox *Laudum*, which signifies Jus recipiendi quod suum est, atque ob id manum injiciendi in bona vel corpus debitoris.

confined to the property of enemies. It will therefore not excite surprise to find that the Common Law of the Sea in matters of prize in the fourteenth century, as it did not proceed upon any principles of Empire, but was framed upon considerations of Corrective Justice, was so far consistent with Natural Right (suum cuique), that neutral property was sacred upon the common highway of Nations, whilst enemy's property, wheresoever found, was good prize. The recognition of this principle may be traced back to the thirteenth century, as it is found to be the basis of a compact between the city of Pisa and the city of Arles, A.D. 1221[12]. In the course of the next century, to which the compilation of the Customs of the Sea may be referred, we find the same principle embodied in treaties which Edward III of England concluded, on the one hand with the maritime cities of Biscaye and Castile A.D. 1351, and on the other hand with the towns of Portugal[13] A.D. 1353; and thus the Customs of the Mediterranean Sea came to extend themselves amongst the merchants and mariners of the Western and Northern Seas. In the following century the Duchy of Burgundy A.D. 1406[14], the City of Genoa A.D. 1462[15], the Duchy of Brittany A.D. 1468[16], and the Duchy of Austria A.D. 1495[17], entered formally into the same system of prize law by treaties concluded with England; and the general practice of European Nations in the fifteenth century may be said to have been uniform in this matter, and so to have continued until the middle of the sixteenth century, when Francis I of France, avowedly with the object of checking neutral frauds, directed the

[12] Muratori Antiquitates Italicæ Medii Ævi, L. IV. col. 398.
[13] Rymer, Fœdera, Tom. III. Part I. p. 71 and 88.
[14] Ibid. IV. Part I. p. 3.
[15] Ibid. V. Part II. p. 92.
[16] Ibid. V. Part II. p. 161.
[17] Ibid. V. Part IV. p. 85.

Règlement of 1543.

Admiralty of France, by the Règlement of A.D. 1543, to condemn the goods of a friend found on board the ship of an enemy, and the ship of a friend, if it should be found laden with enemy's goods.

§ 78. The practice which France has pursued since the Règlement of 1543 has been subject to fluctuations. An Edict of Henry III (A.D. 1584) laid down the same rule for the French Prize Courts which had been promulgated by Francis I, proceeding upon the principle of *hostile infection*, as expressed by the maxim of "Robe d'ennemi confisque celle d'ami." This maxim had been justified by the celebrated French jurist Mornac, upon a suggested analogy with a provision of the Roman Civil Law[18], according to which a vehicle carrying prohibited goods was liable to confiscation with the goods themselves. In 1650 the doctrine of hostile infection was so far relaxed, that whilst enemy's property was to be confiscated, the goods of friends were to be restored to them; but the famous Ordonnance de la Marine of Louis XIV, A.D. 1681[19], revived all the severity of the earlier Regulations of 1543 and 1584. Spain, under the sceptre of the House of Bourbon, followed in the wake of France, and by Article IX of her Ordenanza di Corso, A.D. 1718, adopted the provisions of the Ordinance of Louis XIV[20]. It was not until A.D. 1744 that some relaxation in the severity of the Ordinance of Louis XIV was introduced by an Order in Council[21], directing that whilst enemy's goods should be confiscable on board of a neutral vessel, the vessel itself should be restored to its owners;

Edict of 1584.

French doctrine of hostile infection.

Ordonnance de la Marine of 1681.

Spanish Ordenanza di Corso of 1718.

[18] Dominus navis si illicite aliquid in navi vel ipse, vel vectores imposuerint, navis quoque fisco vindicatur. Dig. L. XXXIX. Tit. IV. c. 2. § 2.

[19] Lebeau, Code des Prises, Tom. I. p. 80.

[20] D'Abreu, Prises Maritimes, c. 9. § 13.

[21] Lebeau, Tom. I. p. 471.

but this order, says Valin[22], was only made from a reference to particular treaties, and in order to give effect to treaty-engagements with particular Powers. The doctrine of hostile infection was at last definitively set aside by the Règlement of 26 July 1778[23], under which, whilst neutral ships carrying contraband of war destined for the enemy were not to be confiscated unless three fourths of their cargo were contraband, privateers were forbidden to seize and detain neutral vessels, unless they were destined to a blockaded or besieged place[24]. The Conseil des Prises in France has interpreted this Règlement to imply the principle of Free Ships, Free Goods; and although its operation was suspended for a short time by the Law of 29 Nivose of the year VI of the Republic[25], whereby a vessel was held to have a friendly or hostile character according as the cargo on board of it belonged to a friend or an enemy, it was once more revived by the Decree of 22 Frimaire, of the year VIII of the Republic[26], and it may be considered to have been the Law of the French Prize Courts down to the breaking out of the war against Russia in 1854. An eminent English Judge (Sir William Grant) in delivering the judgment of the Lords of Appeal in Prize Causes in 1801, upon an incidental question arising in the case of a vessel warranted Swedish property (Sweden being then neutral in the war between Great Britain and

French Règlement of 1778.

Law of the French Prize Courts.

[22] Valin, Ordon. de la Marine, L. III. Tit. IX. Art. VII.

[23] Lebeau, Code des Prises, Tom. II. p. 38. Martens, Récueil, Tom. III. p. 19.

[24] By the Ordinance of 1780 Spain declared that enemy's property should be taken out of neutral ships, and the ships be allowed to go free, whilst freight was to be paid on the goods taken out of them.

[25] Lebeau, Code des Prises, Tom. III. p. 475. L'état des navires, en ce qui concerne leur charactère de neutre ou d'ennemi, sera déterminé par leur cargaison.

[26] Ibid. p. 615.

France), which had been confiscated by a French tribunal in the Isle of France, as enemy's property, under the French Ordinance of 1778, observed, in reference to the various French Ordinances in matters of prize, that when Louis XIV published his famous Ordinance of 1681, "nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law, as then understood and received in France. I say, as understood in France; for although the Law of Nations ought to be the same in every country, yet as the tribunals which administer the Law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in different countries, which acknowledge its authority. Whatever may have been attempted, it was not at the period now referred to supposed, that one State could make or alter the Law of Nations; but it was judged convenient to establish certain principles of decision, partly for the purpose of giving an uniform rule to the Courts, and partly for the purpose of apprising Neutrals what that rule was." The same learned Judge, in commenting upon the administration of the law of Prize by the French Courts under the direction of these Ordinances, observes "that they have not taken them as positive laws binding upon Neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation[27]."

§ 79. The Rule of the Consolat del Mar has

[27] Marshall on Insurance, Vol. I. p. 423.

been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be a correct exposition of the Usage of Nations. "The rule," says Chief-Justice Marshall, "that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original Law of Nations, as generally, perhaps universally, acknowledged. This rule is founded on the simple and intelligible principle, that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical exposition of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy's property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from other considerations, depends in no degree upon the character of the vehicle in which it is carried[28]." To the same effect Mr. Wheaton observes, "Whatever may be the true original abstract principle of National Law on this subject, it is undeniable that the constant usage and practice of belligerent Nations from the earliest times have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty-stipulations, forming a temporary conventional law between the parties to such stipulations[29]." Chancellor Kent, in like manner, affirms it to be "a well settled principle of the Law of Nations, that neutral ships do not afford protection to enemy's property, and it may be seized if

United States of America.

Wheaton.

Chancellor Kent.

[28] The Nereide, 9 Cranch's (American) Reports, p. 418.

[29] Elements of International Law, Part IV. c. 3. § 19.

found on board of a neutral vessel beyond the limit of the neutral jurisdiction[30]." "It is also a principle of the Law of Nations relative to neutral rights, that the effects of neutrals found on board of enemy's vessels shall be free; and it is a right as fully and firmly settled as the other, though, like that, it is often changed by positive agreement. The principle is to be found in the Consolato del Mare[31], and the property of the Neutral is to be restored without any compensation for detention and the other inconveniences incident to the capture. The former Ordinances of France of 1543, 1584, and 1681, declared such goods to be lawful prize; and Valin[32] justifies the Ordinances on the ground that the Neutral, by putting his property on board of an enemy's vessel, favours the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the Neutral has a perfect right to avail himself of the vessel of his friend to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of this right[33]."

Bynkershoek.

§ 80. The Common Law of Nations, which declares the property of an enemy found on the High Seas in the vessel of a friend to be good prize of war, provides at the same time that the friendly shipowner shall not suffer any prejudice by reason of a belligerent doing justice to himself by confis-

[30] Commentaries on American Law, Tom. I. § 124.

[31] Chancellor Kent refers to the Italian translation of the Consolat del Mar.

[32] Comm. sur l'Ordonnance de la Marine, L. III. Tit. IX. Des Prises, Art. VII.

[33] Quæstiones Juris Publici, L. I. c. 14. Ratione consulta, non sum qui videam, cur non liceat capere res hostiles, quamvis in navi amica repertas, id enim capio quod hostis est, quodque jure belli victori cadit. Kent's Commentaries, Tom. I. p. 128.

cating the property of his enemy. If a friendly shipowner is simply the carrier of enemy's property on the High Seas, and does not seek in any way to evade or baffle enquiry on the part of a belligerent cruiser with a view to screen the cargo from capture, his conduct is not inconsistent with neutrality; and reason suggests that the neutral carrier, in case the cargo should be confiscated by the belligerent, should not incur any loss by reason of the voyage, which was in its inception perfectly innocent, being prematurely terminated in the interest of the belligerent. If a belligerent cruiser accordingly arrests the voyage of a neutral merchant vessel on the High Seas, and claims to have the cargo, as being the property of an enemy, delivered up to him or carried into port, as the case may be, the belligerent is bound to pay the neutral shipowner an adequate freight for the carriage of the cargo. The belligerent has no cause of grievance against the neutral shipowner as long as the conduct of the latter is perfectly impartial: under such circumstances his rights, as a belligerent, are solely against his enemy; and if he takes possession of his enemy's property *jure belli*, he takes it under no better conditions than those under which the enemy can himself claim it, namely, with the lien of the freight upon it. A distinction however has been so far made in favour of the belligerent, that he is not burdened with an unreasonable *præmium* upon a voyage evidently hazardous, although such *præmium* may not have been inequitable as between the enemy-shipper and the neutral shipowner. Considerations of various kinds may have influenced the parties to the contract of affreightment, and may have rendered a contract for an advanced rate of freight real and fair between those parties; but the freight, as a burden upon the

Freight payable to neutral shipowners.

Measure of freight.

belligerent captors, does not come loaded with those considerations. The captor is bound indeed to pay an adequate remuneration for the carriage of the cargo, of which he has taken possession by virtue of the right, which a state of war confers upon him, as against his enemy; but the charter-party is not the measure by which the captor is always bound, even where its terms are not colourable nor liable to any imputation of fraud. For instance, the trade may be subject to extraordinary risk and hazard from its connection with the events of war and the activity and success of the belligerent cruisers; and it would be unreasonable for the captor to be called upon to make good an undertaking to pay an extraordinary premium, the specific purpose of which was to encourage the neutral shipowner to use his best efforts to defeat the captor's vigilance. The rate of freight given for the carriage of similar goods under ordinary circumstances is the standard, by which the liabilities of the belligerent captor towards the neutral shipowner are to be measured[33].

§ 81. The Conventional Law of Europe down to the commencement of the seventeenth century seems to have been almost *uno tenore* confirmatory of the rule of the Consolat del Mar, that enemy's goods found on board of a neutral vessel were good prize.

Grand Pensionary De Witt.

It is to the Grand Pensionary De Witt that the introduction of the principle of the neutral Flag covering the Cargo is due; and the treaty by which that statesman laid the foundation of the novel doctrine of Free Ship, Free Goods, was the Treaty of Paris[34], concluded on 18 April 1646, between Holland and France, whereby Louis XIV agreed that for four

[33] Vattel, Droit des Gens, L. III. c. 7. § 115, 116. The Twilling Riget, 5 Robinson, p. 82.

[34] Dumont, Traités, Tom. VI. Part I. p. 342.

years Dutch vessels laden with enemy's property, not contraband of war, should with their cargoes be exempt from capture. The language of this treaty[35] would seem to support the construction put upon it by De Witt, that it provided for the perfect freedom of the Dutch carrying trade; but De Witt found to his surprise that the French interpreted the Treaty merely to provide for the temporary suspension of the Ordonnance of King Henry III (A. D. 1584), according to which, enemy's goods forming part of the cargo of a neutral vessel infected the remainder of the cargo and the vessel itself, and led to the condemnation of both, as good prize. In the course of a few years the Dutch obtained the assent of Spain (A. D. 1650) and of Portugal (A. D. 1661), to the provision that the goods of an enemy found on board of a neutral vessel should be free, whilst the goods of a neutral found on board of an enemy's vessel were to be good prize. In 1662 (27 April) the Dutch succeeded in inducing the French to enter into a Treaty of identical import with the Treaties which they had previously concluded with Spain and with Portugal. England had meanwhile entered into similar engagements with Portugal in 1654[36], and she conceded the same privilege to the Dutch in 1667, as the price of an alliance between the States General and England against France. This privilege was renewed in the following year at Breda, and again in the Treaty of Commerce concluded at London in 1674[37], and the

Treaty of Paris of 1646.

Dutch Treaties.

British Treaties.

[35] Art. I. En telle sorte que les Navires, qui trafiqueront avec la Patente de l'Amiral des Provinces Unies . . . seront libres et rendront aussi toute leur charge libre, bien qu'il est dedans de la Marchandise, même des grains et légumes appartenans aux ennemis, sauf et excepté toutefois les marchandises de contrebande.

[36] Dumont, Tom. VI. Part II. p. 84.

[37] Ibid. Tom. VIII. Part I. p. 49.

relations between Holland and England continued to be so far exceptional to the Common Law of the Sea down to 1756, when on the refusal of the States General to fulfil certain stipulations of the Treaty of 1678, England declared that she would not recognise any longer this treaty privilege in favour of the Dutch. In 1667[38] England admitted the principle of Free Ship, Free Goods, into a treaty concluded with Spain, and in 1677 into a treaty concluded with France. The same principle was also recognised in the Treaties of Utrecht (A.D. 1713) as between France and Great Britain, France and the United Provinces, Spain and Great Britain, Spain and the United Provinces. Denmark, Sweden, and Russia, had severally entered into special treaty-engagements with various Powers prior to the Armed Neutrality of 1780, which comprised amongst its principles that of Free Ship, Free Goods, but not the correlative principle of Enemy Ship, Enemy Goods. Prussia had, on the other hand, admitted both principles into a treaty concluded with Sweden in 1762, and she acceded to the Armed Neutrality on 8 May 1781. The Roman Emperor of the Germans had likewise admitted both principles into a treaty concluded with Spain in 1725[39]; and he entered into a treaty with Russia on 10 July 1781, which recognised the principle of Free Ship, Free Goods. The King of the Two Sicilies acceded to the Armed Neutrality on 10 Feb. 1783, but the action of the Northern Confederacy was suspended by the General Peace concluded in that year. The convenience of the principle, that the neutral Flag covers the Cargo, had thus been very generally recognised by the Nations of Europe prior to the war of the first French

Treaties of Utrecht.

Armed Neutrality of 1780.

[38] Annual Register, A.D. 1780, p. 61.

[39] Dumont, Tom. VIII. Part II. p. 115.

Revolution; since which event several of the European Powers have entered into treaty-engagements in affirmance of this principle, not merely with various European Powers, but with the United States of America, and with several independent States of the South American Continent. Meanwhile the rule of the Consolat del Mar has been held to constitute the Common Law of the Sea, and Nations have acted upon it as such, when no treaty-engagements[40] have bound them to observe a contrary practice.

§ 82. It would appear from the above survey that there are three distinct systems of law in regard to the exercise of Belligerent Right upon the High Seas, which have found favour from time to time with particular Nations, and which are departures from the system of the middle ages, or as it may be conveniently termed, the Rule of the Consolat del Mar. The latter system may be justly said to rest upon principles of Natural Right, and has commended itself to general acceptation as being in conformity with the great maxim of all justice, "suum cuique[41]." The *formula* which expresses it, may be thus stated:— Four systems of Maritime Law.

Enemy Ship, Enemy or Neutral Goods.
Neutral Ship, Neutral or Enemy Goods.

In other words, there is no implied connection between the character of the ship and the character of the cargo; and the immunity of neutral property from capture, whether it be the ship itself or the cargo laden in the ship, is consistent with the confiscation of enemy's property. The belligerent's right The Consolato del Mare.

[40] A very complete review of the treaties on the principle of Free Ship, Free Goods, will be found in Manning's Commentaries on the Law of Nations, pp. 224–280.

[41] Heffter, § 162.

of prize under this system is restricted to the property of his enemy; and whilst his enemy's property in any form on the High Seas is good prize, neutral property in any form is entitled to pass free.

The French System.

§ 83. The first systematic departure from the Rule of the Consolat del Mar was made by France. The Ordinance of Charles II (17 December 1409)[42], which is the earliest extant French Ordinance, had forbidden the Admiral to condemn any ship or merchandise which did not belong to an enemy; and a similar injunction is found in the Règlement of 1517[43]; but the Règlement of Francis I (A.D. 1543)[44] declared a neutral ship carrying enemy's goods, and neutral goods found on board an enemy's ship, to be good prize. This Règlement proceeds upon the principle of enemy's property infecting neutral property; and the *formula* expressing it may be thus stated:—

Enemy Ship, Enemy Goods.
Enemy Goods, Enemy Ship.

The same principle is affirmed by the Edict of Henry III (A.D. 1584)[45]. Sir Leoline Jenkins, writing in 1668[46], seems to doubt whether these Ordinances were ever acted upon in the French Courts of Prize, "the design of the first publishing of them being," in his opinion, "only *in terrorem* for the purpose of putting an end to neutral frauds in concealing enemy's interests." There is no doubt, however, that this principle was embodied in the Famous Ordonnance de la Marine of Louis XIV (A.D. 1681)[47], which formed the Rule of the French Admiralty Courts down to 1744, and that those Courts only allowed of any relaxation in this rule in cases where

[42] Lebeau, Code des Prises, Tom. I. p. 1.
[43] Ibid. p. 5.
[44] Ibid. p. 9.
[45] Lebeau, Tom. I. p. 19.
[46] Life of Sir Leoline Jenkins, Vol. III. p. 720.
[47] Lebeau, Tom. I. p. 80.

France had entered into particular treaty-engagements of an exceptional character.

§ 84. The second systematic departure from the Rule of the Consolat del Mar was brought about by the Dutch in the interest of the Neutral Shipowner, but at the expense of the Neutral Merchant. It proceeds upon the principle that the ship and her cargo are not severable in interest, and that the hostile or neutral character of the ship shall alone be regarded in determining the question as to the cargo being prize or no prize. The *formula* expressing this rule may be stated as follows :— The Dutch System.

Free Ship, Free Goods.
Enemy Ship, Enemy Goods.

According to this rule the goods of a neutral found on board the ship of an enemy are good prize, whilst the goods of an enemy found on board the vessel of a neutral are exempt from confiscation. Grotius, in commenting on the maxim of "Enemy Ship, Enemy Goods," most appositely remarks, that "in order that a thing may become ours by the Right of War, it is requisite that it should have belonged to the Enemy. The things which are in the hands of our enemy, as for example in his towns, or under his protection, but of which the owners are neither the subjects of our enemy, nor actuated by hostile intentions towards us, cannot be acquired by war[48]." He further goes on to say, "wherefore what is said, that goods found in enemy's ships are to be regarded as enemy's property, ought not to be accepted as a settled rule of the Law of Nations, but as raising a certain presumption, which may be rebutted by valid proofs to the contrary; and so it was of olden time adjudged by a full Senate, when war was raging

[48] De Jure Belli et Pacis, L. III. c. 6. Tit. 5.

with the Hanse Towns in 1338, and that judgment has become Law[49]."

§ 85. The third systematic departure from the Rule of the Consolat del Mar has been made with the general consent of all the European Powers, with the exception of Spain. It proceeds upon the principle which was affirmed by the Armed Neutrality of the Baltic Powers in 1780[50], when it declared, that "the property of the subjects of Belligerent Powers should be free, if found on board of neutral vessels, with the exception of contraband of war;" but it leaves untouched the immunity, which neutral merchandise enjoys under the Common Law of Nations, although it be found on board of an enemy's vessel. The Declaration of Maritime Law made by the Plenipotentiaries of the Seven Powers assembled in Congress at Paris on 16 April 1856[51], sanctions the principle, that the neutral flag covers the vessel and its cargo, although the latter may be enemy's property, provided that it be not contraband of war. "Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre." By this declaration the Seven Powers have bound themselves in regard to one another not to act upon the Rule of the Consolat del Mar, under which enemy's property is good prize, if found on board a neutral vessel. There is, however, nothing in this departure from the rule of the Common Law, which is contrary to Natural Right. The doctrine of "Free Ship, Free Goods," taken absolutely and disconnected from the correlative doctrine of "Enemy Ship, Enemy Goods," implies nothing more, than that the Belligerent has consented to waive the exercise of his Natural Right

Declaration of Paris of 1856.

[49] De Jure Belli et Pacis, L. III. c. 6. Tit. 6.

[50] Martens, Récueil, T. III. p. 158.

[51] Martens, N. R. Général, T. XV. p. 792.

to take possession of the property of his enemy, if it should be found on board of a neutral ship. On the other hand the Declaration of the Congress of Paris has affirmed the Rule of the Consolat del Mar in regard to the immunity of neutral property found on board of an enemy's ship, provided it be not contraband of war. "La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi." The Declaration of Paris may therefore be regarded as a step in a perfectly safe direction, involving no vicious principle at variance with Natural Right. Mr. Wheaton[52] has well observed, antecedently to the Declaration of Paris, that the principle of "Free Ship, Free Goods," is perfectly reconcilable with the Rule of the Consolat del Mar as to neutral goods being free, although found on board of an enemy's ship. Speaking of the stipulation that neutral bottoms shall make neutral goods, he remarks that it is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive Law of Nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to confiscation, as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the Law of Nations; but neither reason nor usage renders these two concessions so indissoluble, that the one cannot exist without the other[53]."

§ 86. It was recited in the Declaration of Paris[54] (16 April 1856) that the principles of Maritime Law,

[52] Elements of International Law, Pt. IV. c. 3. § 22.

[53] Cf. the Nereide, 9 Cranch's Reports, p. 419.

[54] The Text of the Declaration is as follows. "Considering that maritime law in time of war has long been the subject of deplorable disputes;

That the uncertainty of the law

adopted by the parties to that Declaration, should not be obligatory upon any States which should not accede to that Declaration; and further, that the Governments of the States, which had joined in the Declaration, should bring it to the knowledge of the States, which had not taken part in the Congress of Paris, and invite them to accede to it. In consequence of such invitation all the European Powers, with the exception of Spain, have acceded to the four articles of the Declaration[55]. Amongst the

and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents, which occasion serious difficulties and even conflicts;

That it is consequently advantageous to establish an uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect.

The above-mentioned plenipotentiaries (of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris April 16, 1856) being duly authorised, resolved to concert amongst themselves as to the means of attaining this object, and having come to an agreement, have adopted the following solemn declaration:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Parliamentary Paper, 1856.

[55] A list of those Powers, which had acceded up to 1858, will be found in Martens, N. R. Gén. Tom. XVI. p. 641. But a more complete list is set out in the instructions sent from the Foreign Office by Earl Russell to Lord Lyons at Washington on 18 May 1861, which were laid before the Congress of the United States in the month of November 1861, with the President's Message, and subsequently presented to both Houses of Parliament in 1862 as Papers, North America, No. 2, p. 111. The latter list is as follows: Baden, Bavaria, Belgium, Bremen, Brazil, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Ham-

States of the Western Hemisphere, the Argentine Confederation, Brazil, Chili, Ecuador, New Granada, Guatemala, Hayti, Peru, and Uruguay, have given in their adhesion to all the articles. Mexico, on the other hand, following the example of Spain, has announced her intention of adopting, as part of her own legislation, the principles embodied in the last three articles, but has declined to accede to the Declaration itself, on account of the first article, which declares Privateering to be abolished. The United States of America have in a similar manner declared their intention of observing the last three articles, and they intimated their willingness to accede to the Declaration itself, if the other Powers would agree to adopt an additional provision, to the effect "that the private property of the subjects or citizens of a belligerent on the High Seas shall be exempted from seizure by the public armed vessels of the other belligerent, except it be contraband." This proposal is sometimes called the Marcy amendment, having been made by Mr. Marcy, Secretary of State to President Pierce. It was withdrawn on the accession of President Buchanan to office in 1857. The result is, that the exercise of belligerent Right upon the High Seas on the part of those Powers, which are parties to the Declaration of Paris, is governed, as respects one another, by the principles affirmed in that Declaration, but as respects the United States of America, and Spain, and Mexico, by the Common

Mexico and Spain.

United States and Confederate States of America.

burg, Hanover, the two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, Wurtemberg, Anhalt-Dessau, Modena, New Granada, Uruguay. This is probably the same list, which was put forth by the French Government in a Memorandum from the Minister of Foreign Affairs, dated 12 June 1858.

Law of Nations, unless there be any preexisting treaty-engagements with those Powers to the contrary. The plenipotentiaries of the Powers assembled in Congress at Paris on the day on which the Declaration was signed, placed on record in a Protocol[56] of that date their agreement, that neither the original parties to the Declaration, nor the Powers that should accede to it, can enter thereafter into any arrangement in regard to the application of Maritime Law in time of war, which does not at the same time rest upon the four principles which are the subject of the Declaration.

Protocol No. 24.

Territorial theory of Hübner.

§ 87. Hübner, in his work upon the seizure of neutral ships published in 1759, had advocated the adoption of the principle of Free Ship Free Goods, concurrently with the maintenance of the rule of the Consolat del Mar, that neutral merchandise should be exempt from capture, although found on board an enemy's vessel. His argument in support of the former principle rested upon two propositions, that neutral ships are neutral territory[57] within which

[56] Protocol No. 24. "Sur la proposition de M. le Comte Walewski et reconnoissant qu'il est de l'intérêt commun de maintenir l'indivisibilité des quatre principes mentionnés à la Déclaration signée en ce jour, MM. les Plénipotentiaires conviennent que les Puissances, qui l'ont signée, ou celles qui y auront accédé, ne pourront entrer à l'avenir sur l'application du droit maritime en temps de guerre, en aucun arrangement qui ne repose à la fois sur les quatre principes objet de la dite Déclaration. Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnait que la présente résolution, ne pouvant avoir d'effet retro-actif, ne saurait invalider les Conventions antérieures." Martens, N. R. Gén. T. XV. p. 768.

[57] "Or les Vaisseaux neutres sont sans contredit des lieux neutres; d'où il s'ensuit que quand ils seraient incontestablement chargés pour le compte de l'ennemi, les belligérans n'ont aucun droit de les inquiéter au sujet de leurs cargaisons, puisqu'il revient au même d'enlever des effets d'un navire neutre, ou de les enlever sur un territoire neutre." De la Saisie des Batimens neutres ou du Droit qu'ont les Nations belligérantes d'arrêter les navires des peuples neutres. La Haye, 1759.

enemy's property is sacred, and that commerce ought to be as free to neutrals in time of war as in time of peace, seeing that neutrals are not parties to the contention. In the same spirit Klüber[58] and Martens[59] both rest the principle of Free Ship Free Goods upon the territoriality of merchant vessels on the high seas. The former writer says, "Upon the ocean, every ship is considered extraterritorial in regard to all foreign Nations. A merchant-vessel ought to be considered as a floating colony of its State. In consequence, no belligerent Power ought to allow itself to visit a neutral ship, nor to confiscate enemy's goods which are on board of it, much less to appropriate to itself the ship by reason of the cargo belonging to an enemy. It is this principle which is expressed by the maxim of law, *the neutral flag covers the cargo* (*die neutrale Flagge deckt die Warre*); in other words, the neutral vessel renders the cargo neutral. It is the same with goods laden on board an enemy's vessel, which a belligerent has not any more the right to confiscate, than if he found them on the continental territory of an enemy." Martens, with a like view, observes, "There is no doubt that a belligerent Power may confiscate enemy's ships with enemy's cargoes; but whilst war does not authorise hostilities in a neutral place, it would seem that the Law of Nature forbids us to capture enemy's goods of an innocent character, which are found on board of a neutral ship, and much more to confiscate the ship; and as war does not authorise us to appropriate the goods of the subjects of a State with which we are at peace, although found in an enemy's country, it is equally forbidden us to confiscate a neutral cargo found in an enemy's vessel;

Klüber.

Doctrine of Martens.

[58] Droit des Gens, Part II. Tit. I. c. 2. § 299.

[59] Précis de Droit des Gens, L. VIII. c. 7. § 316.

accordingly the Law of Nature will suffice to establish the principle that *the flag protects the cargo* (*frey schiff frey gut*), but *never confiscates it* (*verfallenes schiff macht nicht verfallenes gut*). "It must be admitted," he goes on to say, "that an opinion contrary to the first of these principles, namely, that according to the law of Nature regard should be had to the property of the cargo rather than to that of the ship, does not want specious arguments to support it, and that a simple theory will never suffice to make persons agree upon a point, in regard to which their interests are not the same." Of the above writers Klüber is the most logical in his conclusions, as he denies to a belligerent any Right of Visit and Search, which would be a necessary consequence of admitting a neutral ship to all the privileges of neutral territory. Martens, on the other hand, does not claim immunity under the law of Nature for enemy's cargo on board a neutral ship, except it be of an innocent character; but it must not be forgotten that the inviolability of neutral territory is something absolute, and is communicated to everything within it, whether it be suitable or not to belligerent purposes. Martens also admits the Right of Visit to be a Natural Right of belligerents, on the ground that the neutral merchant flag is not sufficient proof that the vessel is not an enemy vessel; but the Right of Visit on the part of a belligerent is inconsistent with the sacred character of neutral territory, more particularly as the object of the visit of a merchant ship by a belligerent is to examine the ship's papers, and to ascertain thereby whether the owners of the ship are friends or enemies, independently of the question whether the vessel lawfully sails under a neutral flag.

Bynkershoek.

§ 88. Bynkershoek had anticipated the territorial

theory of Hübner in discussing the right of a belligerent to take possession of enemy's goods on board of a neutral ship, and had shown its inconsistency with the belligerent Right of Visit. "Velim animadvertes eatenus licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis[60] in navi repertis constet navem amicam esse. Si id constet, dimittam; si hostilem esse constiterit, occupabo. Quod si liceat, ut omni jure licet, et perpetuo observatur, licebit quoque instrumenta, quæ ad merces pertinent, excutere, et inde discere, an quæ hostium bona in navi lateant, et si lateant, quidni ea jure belli occupem." Lampredi[61], writing subsequently to the appearance of Hübner's work, contravenes the fiction of a ship being part of the territory of a State, as altogether untenable. In effect, he says, it is not true to say that men who navigate the High Seas, that is who find themselves in a place which is not subject to the jurisdiction of any Nation, can be regarded as upon the territory of the Nation whose flag they carry, as Hübner has erroneously pretended. The flag, when it is accompanied by sea-papers, only serves to make known to what Nation the crew and the ship belong, that they have set out from a certain port with permission to navigate the Sea, and to hoist the flag which they carry. With regard to other persons who may be on board, they have no other laws to observe than those of natural justice and of the police established by the Sovereign Power of the Nation, as well for the maintenance of good order on board, as for the conduct to be observed in regard to vessels which they may meet with upon

Lampredi.

[60] Quæst. Juris Publici, L. I. c. 14.

[61] Du Commerce des Neutres, en temps de Guerre, traduit par J. Peuchet, Paris, an. X. (1862), p. 139. Part I. § 10.

the Sea. Two vessels which meet under such like circumstances, resemble two carriages which happen to meet in a desert place, which is not in the occupation of any Nation. It would be very absurd for the owner of one of them to pretend that his carriage is the territory of his State, because he has hoisted upon it the flag of his State. The pretension of a marine carriage (voiture de mer) is not less ridiculous, when, having hoisted the flag of a Nation, the owner of the carriage claims that it should be regarded as forming part of the Nation's territory, and as such should be inviolable. The persons of the individuals, who are on board of a vessel on the High Seas, deserve to be respected beyond doubt, and they ought not to be troubled or arrested, not because they are upon a territory, but by reason of Natural Right, which constitutes them free and independent of every other person but their lawful Sovereign. Although it may be perfectly true that violence and injustice exercised on the High Seas against the subjects of a State ought to lead, and does in fact lead, their Sovereign to demand redress even by force of arms, he does not however do so because his territory is violated, but from the general obligation under which he is placed to defend his Subjects from all violence, in whatever place they may be, and to obtain reparation for any damage which they may have suffered."

§ 89. The principle of territoriality has been ably discussed by an English writer. "It remains," says Mr. Manning, "to consider one more position, which has been much relied on by writers, who have claimed that the flag of a neutral shall protect the goods of a belligerent. The argument is based on the fact, that a belligerent has no right to capture the property of his enemy, when in the territory of

Manning.

a neutral. It is asserted that a ship is part of the territory of the State, to which she belongs; and that goods on board a neutral ship are therefore as exempt from capture, as if they were actually in the neutral country itself.

"To argue that a neutral ship is neutral territory is a fiction so palpable, that it appears surprising that it should ever have been insisted on as a tenable position, especially as only one argument is adduced in support of this *territoriality* of ships at sea. The jurisdiction of the State to which a ship belongs extends to the cognisance of acts committed in that ship at sea; and it is argued that this continuance of jurisdiction proves that a ship at sea is part of the territory to which she belongs. This deduction seems, in the first place, farfetched and too flimsy to be made the basis of any serious conclusion. But more than this, it meets with contradictions on its own terms. A ship, say the assertors of this proposition, is part of the State to which she belongs, as is evident, because at sea she is subject to its jurisdiction. Now no Nation has jurisdiction over the territory of another Nation. But as soon as a merchant ship comes into the harbour of a State to which she does not belong, she becomes subject to the jurisdiction of this latter State. This shows that a merchant ship cannot be considered as part of the territory of a State; for if she possesses this character at any time, she must possess it at all times. The fact of a ship at sea being subject to the jurisdiction of the State, under whose flag she sails, is a most reasonable and advantageous regulation: if not amenable to the jurisdiction of their own State, to whom would the crews of ships at sea be answerable? and if they were amenable to no tribunal, the sea would be a place where every

crime might be committed with impunity. But it is difficult to imagine how it can be deduced as a consequence from this, that a ship is part of the territory of her State. The fiction is completely destroyed by the disproof above alleged, but other reasons combine to show how little tenable is this position. If a ship be part of the territory of the State of which her owners are citizens, it cannot be allowed to take from her Contraband of war going to an enemy, because such capture would not be permitted, if the Contraband goods were lying in neutral territory. Again, if neutral ships carry the soldiers of our enemy, it would not be allowable to make them prisoners, because we must not attack the territory of a neutral. Either the argument is worth nothing at all, or it holds to this extent, which is a *reductio ad absurdum*. To escape contradiction, the Right of Search and of seizing contraband goods must be denied, if the right to protect enemy's goods be claimed on this ground[62]." Mr. Manning might have gone even further in tracing out the necessary consequences of the territorial theory, and have added that the right of blockade must also be denied, if neutral ships partake of the inviolable character of neutral territory.

§ 90. If we look to the origin of the Mercantile Flag, it would appear to be a regulation of the municipal Law of individual States, and not to be an institution of the general Maritime Law. The Pass-Port or the Sea-Letter, as the case may be, is the formal voucher of the ship's National Character. The Passport purports to be a Requisition on the part of the Government of a State to suffer the vessel to pass freely with her company, passengers,

The Pass-Port or Sea-Letter.

[62] Manning's Commentaries on the Law of Nations, c. vi. § 1. p. 209.

goods, and merchandise, without any hinderance, seizure, or molestation, as being owned by citizens or subjects of such State[63]. "The first paper," says Sir W. Scott, "which we usually look for, as proof of property, is the Pass[64]." The same learned Judge elsewhere observes[65], "It is a known and well established rule with respect to a vessel, that if she is navigating under the Pass of a foreign country, she is considered as bearing the national character of that Nation under whose Pass she sails. She makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country." The Pass or Sea-Letter was, until very recent times, indispensable for the security of a neutral ship from molestation by belligerent cruisers, and it was the

[63] The best account of the Passport is given by D'Abreu (Part I. c. 2), who justly observes that it covers sometimes the cargo as well as the ship, but that it invariably names the ship, its build, the captain, and his residence. D'Abreu also gives an account of the Sea-Letter, which he describes as being in the same form as the Pass. The difference between them would seem to consist in this, that whilst the Pass is issued in the name of a Sovereign Power or State, the Sea-Letter is issued in the name of the Civil Authorities of the port from which the vessel is fitted out. The form of a Sea-Letter is annexed to the Treaty of the Pyrenees (A. D. 1659), under which it was provided that Free Ships should make Free Goods. It is termed "Literæ Salvi Conductus," and the force and effect of it is thus described in the XVIIth Article of the Treaty itself: "Ex quibus non solum de suis mercibus impositis, sed etiam de loco domicilii et habitationis, ut et de nomine tam Domini et Magistri navis, quam navigii ipsius constare queat: quo per duo hæcce media cognoscatur, an merces vehant de *Contrebande*, et sufficienter tam de qualitate, quam de Domino et Magistro dicti navigii constet. His literis salvi conductus et certificationibus plena fides habebitur." In the Treaty of Copenhagen concluded 11 July 1670, between Great Britain and Denmark, the Sea-Letter is termed a Certificate; and it is provided that the ships of either Confederate shall carry Letters of Passport and a Certificate, of which the forms are set forth in the body of the treaty. This Sea-Letter or Certificate extended to the cargo.

[64] The Hoop, 1 Ch. Rob. p. 130.

[65] The Vigilantia, 1 Ch. Rob. p. 13.

only paper to which any respect was paid by the Corsairs of the Barbary States, as warranting the vessel to be within the protection of their respective treaty-engagements with the European Powers[66]. If a vessel be furnished with a Pass or Sea-Letter, it is immaterial whether she has any mercantile Flag on board or not. The latter by itself is not a criterion of the national character of the owners of the vessel. By an early Statute of the City of Lubeck[67] (A. D. 1299), every citizen of Lubeck, who was master (patron) of a ship, was bound to hoist the flag of Lubeck, under pain of a fine of three marks of silver for the benefit of the Senators and the City of Lubeck. A similar regulation had been made by the City of Hamburg (*mutatis mutandis*) with regard to masters of vessels who were citizens of Hamburg. (A. D. 1270.) On the other hand, by a Statute of the City of Marseilles, of still earlier date, between 1253 and 1255, we find it provided that every ship belonging to men of Marseilles shall be bound to hoist on the ship the flag of the community of Marseilles with a cross extended aloft; and that no citizens of Marseilles who are owners (domini) of ships may or ought to hoist on their ships, within the port of Marseilles or elsewhere, any arms or any flag of another civic community, but only the flag of the community of Marseilles, except in the land of Syria, in which those citizens of Marseilles, who have special privileges in that

[66] An account of the Mediterranean Passes will be found in Reeves's History of the Law of Shipping, Pt. III. p. 423.

[67] Pardessus, Lois Maritimes, Tom. III. p. 411. Tout patron, bourgeois de Lubeck, sera tenu d'arborer le pavillon Lubeckois, sous peine d'une amende de trois marcs d'argents au profit de MM. les sénateurs et de la ville de Lubeck, à moins qu'il n'en soit empêché par des obstacles de force majeure, ou par des dangers aux quels sa personne ou son navire seroient exposés.

country distinct from the other citizens, may hoist another flag on their ships, provided also that they likewise hoist always the flag of the community of Marseilles[68]. It would thus appear that the Mercantile Flag was originally of ambiguous import, inasmuch as it might denote either the National character of the Master or patron[69] of the ship, or the National character of the owner of the ship; but that the Pass or Sea-Letter was always a criterion of ownership, that is, whether the ship was the property of an enemy or friend. Hence Bynkershoek justifies the Right of a belligerent cruiser to visit a neutral ship, in order that it may be established from the ship's papers, as distinguished from her flag, that she is neutral property. But the legal incidents of ownership, as regards a ship, are quite irreconcilable with the theory of a ship being the territory of the Nation whose flag she carries. By the general Maritime Law a ship is capable of being owned in shares, and there is nothing in the Law Maritime which precludes a ship from being owned in shares by citizens of different States. Again, although it may be sometimes the policy of a State to exclude foreigners altogether from the right of owning any part of a vessel entitled by the municipal law of that State to hoist its Mercantile Flag, still that is not the invariable rule, and the actionaries or part-owners of a merchant ship are in some cases permitted by the municipal law of a State to be citizens of different countries. In such a case, however, a belligerent cruiser is entitled to look at the

[68] Pardessus, Lois Maritimes, Tom. IV. p. 272.

[69] Emérigon, in his Treatise on Insurances, c. 7. § 5, says, "They also call *captain* him who commands a merchant vessel intended for a long voyage; but persons commanding trading barques, or merchant vessels not making long voyages, are entitled on the ocean *masters*, and in the Mediterranean *patrons*."

Pass or Sea-Letter of the ship, and Courts of Prize have held the ship to be bound by the character imposed upon it by the authority of the Government from which the Pass or Sea-Letter has issued[70].

§ 91. In the sight of a belligerent a merchant vessel is regarded simply as a vehicle conveying goods over sea to or from a market. Accordingly, under the Common Law of Nations, if the vehicle and goods should happen to be enemy's property, the belligerent takes possession of them *jure belli;* if on the other hand the ship should belong to a friend, and the cargo should be enemy's property, the belligerent relieves the carrier of his charge, indemnifying him at the same time for the carriage of the goods. If again the ship should belong to an enemy, and the cargo should be neutral property, the belligerent takes possession of the ship, whilst he restores the cargo to the neutral merchant. Further, both the ship and cargo may be the property of neutrals, whilst their destination is the port of an enemy; in which case a belligerent has a right to prohibit the conveyance of the goods to their destination, if their safe arrival is likely to be prejudicial to his success, and under certain circumstances he is entitled to seize and confiscate them. On the other hand, a neutral merchant is entitled to transport his merchandise over sea to a neutral port, in time of war, free from any interference on the part of a belligerent, beyond that, which may be necessary to assure the belligerent of the innocent character of the voyage. For the purpose, however, of such assurance, a belligerent has a right to visit a merchant vessel on the High Seas, with the object of ascertaining who may be its

[70] The Vreede Scholtys, cited in a note to the Vrow Elizabeth, 5 Ch. Rob. p. 5.

owner and what may be its destination, and of searching it with the object of ascertaining the nature and ownership of its cargo. "The Right of visiting and searching merchant ships on the High Seas," observes Lord Stowell, in the well-known case of the Swedish Convoy, "whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable Right of the lawfully commissioned ship of a belligerent Nation; because till they are visited and searched it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this Right of Visitation and Search exists. This Right is so clear in principle, that no man can deny it who admits the Right of maritime capture, because if you are not at liberty to ascertain by sufficient enquiry whether there is property which can be legally captured, it is impossible to capture. Even those who contend for this inadmissible rule, that free ships make free goods, must admit the exercise of this right at least, for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for the practice is uniform and universal upon the subject[73]." "We cannot prevent the carriage of contraband goods," says Vattel[74], "without searching neutral vessels that we meet at sea; we have, therefore, a right to search them. "In order to enforce the rights of belligerent Nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the High Seas, the Law of Nations arms them with the practical power of visitation

Right of Visitation and Search.

The Swedish Convoy.

Vattel.

[73] The Maria, 1 Robinson, p. 36. § 114. Martens, Précis, L. VIII. c. 7. § 321.

[74] Droit des Gens, L. III. c. 7.

Chancellor Kent.

and search." Such is the language of Mr. Chancellor Kent[75], who goes on to say, "Neutral Nations have frequently been disposed to question and resist the exercise of this Right. This was particularly the case with the Baltic Confederacy during the American war, and with the Convention of the Baltic Powers in 1801. The Right of Search was denied, and the flag of the State was declared to be a substitute for all documentary and other proof, and to exclude all right of search. Those Powers armed for the purpose of defending their neutral pretensions; and England did not hesitate to consider it as an attempt to introduce by force a new code of maritime law, inconsistent with her belligerent rights, and hostile to her interests, and one which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the Right of Search has, since that time, been considered incontrovertible." Mr. Wheaton[76] coincides in this opinion, when he says the Right of Visitation and Search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property at sea be ever so strictly limited, and the rule of *free ship free goods* be adopted, the Right of Visitation and Search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the Law of Nations and Treaties; for, as Bynkershoek[77] observes, "it is lawful to detain a neutral vessel in order to ascertain, not by the flag merely, which

Convention of the Baltic Powers.

Wheaton.

[75] Commentaries on American Law, Tom. I. p. 153.

[76] Elements, Pt. IV. c. 3. § 29.

[77] Quæstiones Jur. Publ. L. I. c. 14.

may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognising the existence of this Right[78].

Right of Approach

§ 92. The Right of Approach on the High Seas, in time of war, may be distinguished from the Right of Visitation and Search. Upon the general question of the Right of Approach on the High Seas, it may be justly said that no vessel has any exclusive Right to the use of the ocean beyond that extent of it, which the vessel physically occupies, and which is essential for her movements. Merchant ships, accordingly, are in the habit of approaching one another within such limits as are consistent with the safety of navigation, either with a view to ascertain the name and character of strangers, or to procure information or assistance. With respect to ships of war sailing under the authority of their Government to maintain the general police of the High Seas and to arrest pirates and other public offenders, there is no reason why they may not approach any vessel descried at sea for the purpose of ascertaining its real character. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those whom they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is under such circumstances bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her own voyage in her own way, and to use all necessary precautions to

[78] Martens, Précis, L. VIII. c. 7. § 317 and 321. Lampredi, Du Commerce des Neutres, § 12.

avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either in regard to delay or in regard to the progress and course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to be the natural result of the common duties and rights of Nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it[79].

§ 93. It is obvious that the Right of Approach in time of war will be subject to different considerations from those, which govern that Right in time of peace. As resistance on the part of a neutral vessel to the Right of Visitation and Search, when sought to be exercised by a lawfully commissioned belligerent cruiser, entails, as a penalty, the condemnation of the ship and cargo by a Court of Prize, it is due to the owners of the neutral vessel and her cargo, that the belligerent cruiser shall so conduct herself, as to leave no doubt in the mind of the master and crew of the neutral vessel of the lawful character of the cruiser, when she approaches for the purpose of visiting the neutral vessel. With this object the regulation of the exercise of the Right of Visitation and Search has been frequently the subject of treaty-engagements between the European Powers. Lampredi has observed, that as it is an usage of long standing for captains of vessels, whether merchant

Regulation of Right of Visitation and Search.

[79] The Mariana Flora, 1 Wheaton, p. 43.

or armed vessels, to hoist any flag which they think most suitable with the object of deceiving or surprising other vessels and approaching sufficiently near to prevent their escape, the master of a neutral merchant ship cannot with reason be required to stop the course of his vessel upon the mere display of a belligerent flag on board another vessel, inasmuch as he might thereby expose his vessel to be captured by a pirate. Accordingly the neutral master has a right to be assured of the just claim of an armed vessel to visit his ship and cargo, before he can be liable to any penalty for attempting to escape[80]. On the other hand, it is an universally received maxim that whoever claims to exercise a right against any person, must commence by proving that he is entitled to the right. There being then two rights at issue, neither of which can be safely abandoned without on the one hand impairing too much the efficient action of a belligerent cruiser, and on the other hand endangering too much the safety of the neutral merchant vessel, it has been from time to time the object of various European Powers to come to an understanding with one another as to the forms, under which the Right of Visitation and Search should be exercised by belligerent cruisers, so as to relieve, as far as the nature of the subject would allow, the masters of neutral ships from all peril in obeying the summons of a belligerent cruiser. Lampredi[81] considers that it is no longer a matter of mere Conventional law, but may be regarded as an established usage, that the flag of a belligerent cruiser must immediately, after it has been hoisted as a signal for a merchant vessel to shorten sail,

Rule of an affirming gun.

[80] San Juan Baptista, 5 Ch. Rob. p. 34.

[81] Du Commerce des Neutres, § 12.

be affirmed by a gun fired with blank cartridge, and further that the cruiser must at such time not approach the merchant vessel so close as to cause the latter to apprehend any but peaceful intentions on its part. Upon the merchant vessel shortening sail, the cruiser is entitled to send a boat's crew on board of her to examine her papers, and if necessary to search her cargo, and the master of the merchant vessel is bound to submit all his papers to examination, and to permit his cargo to be overhauled.

Mr. Justice Story.

Mr. Justice Story is disposed not to admit that there exists any universal rule or obligation of an affirming gun. "It may be," he observes, "the law of the maritime states of the European continent, founded in their own usages or positive regulations. But it does not hence follow that it is binding on all other Nations[82]."

General Halleck.

General Halleck, formerly Secretary of State for California, in his work on International Law, published at San Francisco in 1861, observes, that "the usual mode, adopted by most of the Maritime Powers of Europe, of summoning a neutral to undergo Visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce, coup d'assurance*, and by the English *affirming gun*. It is undoubtedly the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such *an affirming gun;* for its use is by no means universal. Moreover any other method, as hailing by signals, &c. of summoning a neutral to submit to an examination, may be equally as effective and binding as the *affirming gun*, if the summons is actually communicated to and understood by the neutral. The means used are not essential, but the fact of a summons actually communicated is necessary to acquit the

[82] The Mariana Flora, 11 Wheaton, p. 50.

visiting vessel of all damages, which may result to the neutral disobeying it[83]." On the other hand, Sir R. Phillimore seems to consider that the received mode of summoning the neutral to undergo Visitation is by the firing of a cannon shot on the part of the belligerent, and that it is the *distance* at which this shot shall be fired, which has been the subject of particular conventions[84]. M. Heffter[85] observes that the exercise of the Right of Visitation has been more especially regulated by the Treaty of the Pyrenees[86], of which the dispositions in this matter have become in some manner the Maritime Law of Europe. Upon a careful review of the practice of the European Powers in modern times, it would appear that no neutral merchant ship is bound to shorten sail, unless the belligerent cruiser fires a gun to warn her of her intention to visit her. Whether the gun shall be fired before the cruiser displays her flag, or immediately after she has shown her colours, may be immaterial. The two conditions which ought to be fulfilled by the belligerent cruiser, in justice to the master of the neutral merchant vessel, before the latter can be held to act in contravention of any belligerent right, are that the true character of the cruiser herself shall be made known to him by the exhibition of her military flag, and that her intention to visit the merchant vessel in virtue of her belligerent right shall be notified to him by the firing of a gun. If the neutral ship should have sailed prior to hostilities, and her master and crew should be in perfect ignorance of the existence of war, and consequently unconscious that they have any neutral duties to perform, a mere attempt to

Sir Robert Phillimore.

Heffter.

[83] Chap. XXV. On Visitation and Search, § 15.

[84] Commentaries, Vol. III. § 332.

[85] Das Europäische Völkerrecht, § 169.

[86] Dumont, Tom. VI. Part ii. p. 264. Schmauss, Corp. Jur. Gent. p. 683.

escape on their part from an armed ship, which proves herself afterwards to be a belligerent cruiser, will not be a breach of neutral obligation[87].

Treaty of the Pyrenees.

§ 94. By Article XVII of the Treaty of the Pyrenees (7 Nov. 1659), which is considered to embody the common Law of Nations on the subject, the object of the Right of Visit is explained to be the inspection of the ship's Pass or Sea Letter, whereby the nature of her cargo, and likewise the domicil and residence and names of her master and of her owner, as well as the nationality of the vessel herself, may be ascertained. The practice of Nations in regard to a ship's Pass has undergone some modification. Where treaties exist in regard to the exhibition of a Pass or Sea Letter, such ships only as are furnished with the specified Pass or Sea Letter are entitled to the treaty-privileges, whatever they may be. In other cases the Pass is not in the present day an indispensable document, if there are other papers on board, which satisfactorily establish the character, property, and destination of the ship and cargo. Amongst them the most important is the Builder's Contract, or the Bill of Sale in case the ship has ever changed owners; and in addition the Certificate of Registry, if the municipal law of the port, from which the ship hails, requires that she should be registered. If these two papers are on board and their *bona fides* is not impeached, the proof of the property as regards the ship will be sufficiently complete, so far as documentary evidence is concerned. With regard to the cargo, if the ship is a general ship, her Manifest and the Bills of Lading are the best evidence of both the ownership and the destination of the cargo. If on the other hand the vessel should be chartered, the Charter-Party should also be on board; but the absence of the Charter-

Ship's papers.

Builder's Contract or Bill of Sale.

Cargo of papers.

Charter party.

[87] San Juan Baptista, 5 Ch. Rob. p. 35.

Party will not justify the condemnation of the ship, any more than the absence of the Invoice of the goods; but the non-production of any Ship's Paper, which is in strict law documentary evidence in regard either to the ship herself or to the cargo, will justify the sending the vessel into port for enquiry[88], in order that the master may account satisfactorily before a Court of Prize for the absence of the missing document.

Right of Detention.

§ 95. The Right of Detention for enquiry is a corollary to the Right of Visitation and Search. If the commander of a belligerent ship of war, having examined the papers found on board a merchant vessel, shall perceive just and sufficient reasons for detaining her in order to proceed to a further examination, he may order a prize crew to go on board of her and conduct her to the nearest and most convenient port belonging to his Nation, subject to a full responsibility in costs and damages, if this should have been done without just and sufficient cause in the opinion of a duly constituted Court of Prize. "It is a rule of law," says Lord Stowell, "that the neutral vessel shall submit to the enquiry proposed, looking with confidence to those tribunals, whose noblest office (and I hope not the least acceptable) is to relieve by compensation inconveniences of this kind, if they have happened through accident or error, and to redress by compensation and punishment injuries that have been committed by design[89]."

[88] D'Abreu specifies nine papers which should be on board a ship in order that her papers should be regular. 1. Le Passport. 2. Les Lettres de Mer. 3. Le Journal. 4. Le Certificat de Santé. 5. L'Appartenance ou Propriété de Navire. 6. L'Inventaire des Marchandises. 7. La Charte-partie. 8. Les Connoissemens. 9. La Facture. He does not include La Rôle d'Equipage amongst the requisite papers, which Klüber however enumerates. Cf. Klüber, Droit des Gens, § 294.

[89] The Maria, 1 Ch. Rob. 374.

§ 96. Every belligerent Cruiser has a right to insist on verifying the neutral character of every ship which it meets with on the High Seas, and which carries a neutral flag; and it is a clear maxim of law, that "a neutral vessel is bound in relation to her commerce to submit to the belligerent Right of Search." A neutral merchant accordingly cannot adopt any measures, of which the direct object is to withdraw his commerce on the High Seas from the free exercise of the Right of Search on the part of any belligerent cruiser. It is not competent therefore for a neutral merchant to exempt his vessel from the belligerent Right of Search by placing it under the Convoy of a neutral or enemy man-of-war[90]. "The very fact of sailing under the protection of a belligerent or neutral convoy," says Mr. Chancellor Kent[91], "is a violation of neutrality." Mr. Wheaton to a similar effect, in discussing the Danish captures under the ordinance of 1810, asks, "Why was it that navigating under the convoy of a neutral ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent Right of Search; to render every attempt to exercise this lawful Right a contest of violence; to disturb the peace of the world, and to withdraw from the proper Forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction[92]." Actual resistance on the part of the convoying man-of-war is not necessary to establish the unneutral character of the act of a merchant vessel sailing under its protection. Lord Stowell in commenting on the suggestion that the intention to resist the Right of Search was never carried into

Neutral may not sail under convoy.

Chancellor Kent.

Wheaton.

[90] Mr. Justice Story in the Nereide, 9 Cranch, p. 438.

[91] Commentaries, Tom. I. p. 154.

[92] Elements of International Law, Part IV. c. 3. p. 597.

effect by a neutral vessel which had sailed under convoy of a man-of-war, observes that "the intention is unchangeable, and being so, I do not see the person who could fairly contradict me, if I were to assert that the delivery and acceptance of such instructions and the sailing under them were sufficient to complete the act of hostility[93]."

§ 97. It is not by the Common Law of Nations a ground for confiscating the goods of a neutral merchant, that they have been shipped on board an enemy merchant vessel, even if the master of the enemy vessel should resist the exercise of the Right of Search on the part of a belligerent cruiser. The forcible resistance of the master of an enemy merchant vessel is nothing more than the hostile act of a person who is entitled to commit acts of hostility; and there is nothing *per se* unneutral in the conduct of the merchant who has embarked his goods on board of an unarmed vessel, which is enemy's property. It is a proceeding which is more likely to be attended with inconvenience to the merchant, than if he had embarked his goods on board a neutral vessel, inasmuch as the enemy vessel is liable to be captured by the belligerent, in which case the merchandise may undergo a change of destination, and fail to reach its intended market. That circumstance however is for the consideration of the neutral merchant, who cannot be presumed to contemplate resistance. "If a neutral master," says Sir William Scott[94], "attempts a rescue, he violates a duty which is imposed upon him by the Law of Nations, to submit to come in for enquiry, as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the

British Prize Courts.

[93] The Maria, 1 Ch. Rob. p. 376.

[94] The Catherina Elizabeth, 5 Ch. Rob. p. 232.

property of his owner[95], and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the Rights of War[96]. With an enemy-master the case is very different. No duty is violated by such an act on his part,—*lupum auribus teneo*,—and if he can withdraw himself he has a right to do so." On the other hand, if a neutral merchant should ship his goods on board an armed ship belonging to the enemy, Lord Stowell has held that such an act betrays an intention on the part of the merchant to withdraw his goods from visitation and search, for it is a *presumptio juris et de jure* that an armed ship will resist visitation and search. If a merchant accordingly has placed his goods under the protection of a belligerent force, he must be taken to intend to receive the protection of it in such manner and under such circumstances as the belligerent may choose to apply it[97]; in other words, he abandons the protection of Neutrality, and must for the time be regarded as adhering to the Enemy.

Neutral merchandise in an armed ship of the enemy.

Prize Courts of the United States.

The Supreme Court of the United States has held that there is no valid distinction of Right between the act of a neutral merchant who loads his goods on board an enemy merchant ship, and the act of a neutral merchant who ships his goods in an armed vessel belonging to the Enemy. The opinion of Chief-Justice Marshall, who with the majority of the Court decided in the case of the Nereide[98], "that a neutral merchant had a right to charter and lade his goods

[95] The Despatch, 3 Ch. Rob. p. 278.

[96] The Washington, 2 Acton, p. 30. n. The Franklin, 2 Acton, p. 109. The Short Staple *v.* the United States, 9 Cranch, p. 55.

[97] The Fanny, 1 Dodson, p. 443.

[98] 9 Cranch, p. 388. This decision took place in February Term, 1815, and was nearly contemporaneous with Lord Stowell's judgment in the Fanny.

on board a belligerent armed vessel without forfeiting his neutral character," is entitled to great weight, not merely from the authority which attaches to the opinions of that eminent Judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded. But the opinion of Mr. Justice Story was the other way, and coincided with the view of Lord Stowell. The Supreme Court of the United States, in February Term 1818, maintained the same view in the case of the Atalanta[99] as it had previously maintained in the Nereide; so that the decisions of the highest tribunal in the United States is on this point in direct conflict with the judgment of the English High Court of Admiralty.

[99] 3 Wheaton, p. 241.

CHAPTER VI.

ON BLOCKADE.

Ancient practice of prohibiting all trade with the enemy—Object of a blockade—Penalties for the violation of a blockade—Regulated exercise of the Right of blockade—Legal requirements of a binding blockade—Declaration of the Congress of Paris—Characteristics of an effective blockade—Knowledge on the part of the Master of a vessel—Constructive Warning—Public Notification—General Notoriety—Notification dispensing with actual warning must accord with the fact of a blockade—Practice of the French Prize Courts—Practice of the United States Prize Courts—Violation of a blockade—Equity of British Prize Courts—Favourable construction of Licenses—Breach of blockade by egress—Egress lawful in certain cases—Duration of *delictum* after egress—Effect of fraud in egress—Cargo not always condemned with the ship—Extent of coast which may be placed under blockade—Limited operation of a blockade—Effect of a blockade on Licenses—Effect of Licenses on a blockade.

Ancient practice of prohibiting all trade with the enemy.

§ 98. THE practice of a belligerent Power prohibiting all trade with an Enemy is of very ancient date. We have records of such a practice as early as the commencement of the thirteenth century[1]. It seems to have been usual in that and the next following century for belligerent Powers on the outbreak of war to issue proclamations, warning all persons not to attempt to import victuals or other merchandise

[1] Proclamation of Henry III. anno 1223. Rymer's Fœdera, Tom. I. p. 440. Robinson's Collectanea Maritima, p. 158.

into the Enemy's territory, and thereupon to arrest and confiscate the vessels and merchandise of any who might contravene such warning, as the property of parties adhering to the Enemy[2].

The States General of Holland appear to have maintained this practice without any dispute on the part of other Nations as late as the latter part of the sixteenth century; but it came to be questioned towards the end of the seventeenth century as an immoderate exercise of belligerent Right, since which time it has been generally reprobated and disclaimed, and may now be regarded as fallen into desuetude. On the other hand, the practice of intercepting all merchant vessels trading with the Enemy's ports by means of armed vessels cruising off the Enemy's coast is as ancient as war itself. Lord Stowell, who was always extremely reluctant to apply in its full rigour the European Law of Nations to subjects of the Ottoman Porte, considered the Law of Blockade to be an exception[3], on the ground that a blockade was one of the most universal and simple operations of war in all ages and countries, excepting such as were nearly savage. "It must not be understood by them," he says, "that if an European army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the operation of a blockade perfectly nugatory. They in common with all other Nations must be subject to this first and elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any kind. It is not a new operation of war; it is almost as old and as general as war itself.

[2] Letter of Edward II of England to Philip V of France. Tanquam dictis inimicis adhærentes. Rymer's Fœdera, Tom. III. p. 880.

[3] The Kinders Kinder, 2 Ch. Rob. p. 89.

The subjects of the Barbary States could not be ignorant of the general rules applying to a blockaded place, so far as concerns the interests and duties of neutrals[4]."

Object of a blockade.

§ 99. The object of a blockade is to reduce the enemy to surrender by cutting off his supplies of every kind. War being a contention by force in the prosecution of Right, the primary object of war is to constrain the wrong-doing Nation to desist from doing wrong, and to make compensation for past injury. With this object, it is lawful for a belligerent to seize the property of an enemy as a pledge of redress for the past, and of good conduct for the future; and if the Enemy resist, to use force; and if it should be necessary in self defence, even to take away an enemy's life. The intercepting all supplies going to an enemy is a milder alternative, the immediate effect of such a measure being to constrain the Enemy to submit by the inconvenience, to which the failure of his supplies will expose him. Blockade is thus a more lenient proceeding in the conduct of a war, than actual assault. The latter involves the necessary sacrifice of human life, and by the destruction of property which it entails, may risk to destroy the means whereby compensation may be made by the Enemy for past injury. The former gives to the Enemy the option of being spared the effusion of human blood, whilst the belligerent at the same time refrains from destroying property. As between belligerent parties the establishment of a blockade is thus obviously not an improper use of superior force, and as the introduction of supplies by neutral merchants into a blockaded port must necessarily tend to frustrate the purpose of the belligerent party, which is to reduce

[4] The Hurtige Hane, 3 Ch. Rob. p. 325.

the Enemy to terms by cutting off his supplies, it would be evidently to the prejudice of the just right of a belligerent that a merchant should attempt to introduce any supplies into a place, which is blockaded. A belligerent Power will accordingly be entitled to prevent the introduction of any such supplies; and if a merchant persists after notice in attempting to introduce them, the belligerent may seize and confiscate them. "If the supplies sent," says Grotius, "hinder the execution of my design, and the sender might have known as much, as if I have besieged a town or blocked up a port, and thereupon I presently expect a surrender or a peace, that sender is obliged to make me satisfaction for the damage that I suffer on his account, as much as he that shall take a prisoner out of custody that was committed for a just debt, or help him to make his escape, in order to cheat me; and proportionably to my loss I may seize his goods, and take them as my own, for recovering what he owes me[5]. Two conditions, it will be observed, are implied by Grotius in the case as thus stated, namely, actual measures on the part of the belligerent to stop all supplies being furnished to his enemy, and a knowledge of that fact on the part of the neutral merchant.

Penalties for the violation of a blockade.

§ 100. Blockade being thus a lawful means of constraining an enemy to submit to terms, and recourse to a blockade being sometimes necessary, when the enemy is by position inaccessible to direct assault, it follows that it is inconsistent with Neutrality for any third party to interfere with the operations of

[5] Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio, aut pax expectabatur, tenebitur ille mihi de damno culpâ dato. De Jure Belli, L. III. c. 1. § v. 3.

a blockade, and by introducing supplies into the blockaded place to hazard the defeat of the object, which the Belligerent Power has in view in resorting to such a measure. An attempt to relieve the necessities of an enemy, who is shut up in a place invested by a belligerent, is so clear an interference with the just operations of war, that the party so acting may with reason be treated as *pro hâc vice* adhering to the enemy. Grotius says, with special reference to the introduction of supplies into a blockaded place, that "if my enemy's injustice towards me be evident, the neutral who aids him in his unjust war will be guilty not only of a civil, but of a criminal offence, and may be punished accordingly[6]." Bynkershoek[7] says, that "to carry supplies to a besieged enemy has been always a capital offence in friends, equally as in subjects, after notice given to them, and sometimes even without notice; and further, that if the supplies be intercepted by the belligerent, he may not only confiscate them, but inflict corporal, if not capital, punishment upon those who seek to introduce them." Vattel[8] writes, "All commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering it, and to treat as an enemy whosoever attempts to enter the place, or carry anything to the besieged parties, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war." The practice of Nations in the earliest times sanctioned the enforcement of the severest penalties against all merchants, who should attempt to enter any port, which had

[6] De Jure Belli, L. III. c. 1. § 3.

[7] Quæst. Jur. Publ. L. I. c. 11.

[8] Droit des Gens. L. III. c. 7. § 117.

been placed under blockade by a belligerent Power. King Demetrius hanged up the master and pilot of a vessel carrying provisions to Athens at a time when he was on the point of reducing that city by famine[9]. So Pompey the Great, during the war against Mithridates, set guards at the mouth of the Bosphorus, to observe if any sailed into the Bosphorus; and whosoever were captured, were put to death[10]. Such extreme penalties, however, may be regarded as having long since fallen into desuetude, although there are modern publicists who maintain the absolute Right of a belligerent to have recourse to them. Thus Martens[11] says, that "a belligerent may forbid all commerce with a place which he is besieging or blockading, and the approaches to which he can occupy; and in every case he may confiscate the goods and ships of those, who attempt to trade with the enemy in spite of notice to abstain from so doing, and even inflict personal penalties and death upon them." So Heffter[12] says, "The seizure of the ship and cargo and their confiscation, whatever be the nature of the cargo or the character of its owners, constitute the penal sanction of the prohibition issued by the belligerent. The captain and his accomplices may also be subjected to severe penalties. The actual usage of Nations is in general accordance as to this principle; but the application of it has given rise to numerous complications and ardent disputes."

Regulated exercise of the Right of Blockade.

§ 101. It has been observed that the ancient usage of belligerents to forbid by Proclamation all trade with the enemy, and to confiscate the property of parties contravening their Proclamation, was successfully impugned in the seventeenth century, as an

[9] Plutarch. in Demetrio.
[10] Plutarch. in Pompeio.
[11] Précis du Droit des Gens. § 314.
[12] Das Europäische Völkerrecht, § 154.

immoderate and unreasonable exercise of belligerent Force, and may now be regarded as having no sanction from the modern practice of European Nations. We may trace back to the same century the first systematic attempt to regulate the belligerent Right of Blockade, which originated with the Dutch.

The States General of the United Provinces, proceeding upon the advice of their Courts of Admiralty, issued an Ordinance on 26 June 1630, the object of which was to regulate the blockade of the Ports of Flanders, then in possession of the Spanish Crown. The purport of the first article of that Ordinance was, that neutral vessels found coming out of or entering into enemies' ports in Flanders, or so near to them that their intention to enter them was beyond all doubt, should be confiscated with their cargoes by sentence of the said Courts, "inasmuch as their High Mightinesses *keep the said ports continually blockaded* by their vessels of war at an excessive charge to the State, in order to hinder all transport to and commerce with the enemy; and because those ports and places *are reputed to be besieged*, which has been from all time an ancient usage after the example of all Kings, Princes, Powers, and other Republics, which have exercised the same Right on similar occasions[13]."

It will be seen that this Ordinance contemplates that three things shall be proved before the Courts of Admiralty: (1) the existence of a blockade *de facto*; (2) the reputation of such a blockade; and (3) an undoubted intention to violate the blockade. These three conditions are in perfect accordance

[13] Robinson's Collectanea Maritima, p. 158. These Ordinances are also set forth in a note to the Hurtige Hane, 3 Ch. Rob. p. 327.

with those laid down by Lord Stowell (12 Dec. 1798[14]) in the case of the Betsey, and which have been approved by the Lords of Appeal in Prize Causes. "On the question of blockade," he says, "three things must be proved: 1st, the existence of an actual blockade; 2d, the knowledge of the party; 3d, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade."

Legal requirements of a binding blockade.

§ 102. The point therefore which first requires to be considered is, what constitutes an actual blockade. It was one of the objects of the Armed Neutrality of 1780 to establish a more precise rule than had hitherto prevailed for determining that a port was actually under blockade, so as to impose upon neutral merchants an obligation to abstain from trading with that port[15]. In pursuance of that object the Empress of Russia communicated to the various European Powers a Declaration of the principles of the Armed Neutrality comprised in four propositions, the fourth of which was to the effect that, "in order to determine what characterises a blockaded port, that term shall only be applied to a port, where, from the arrangement made by the attacking Power with vessels stationed off the port and sufficiently near, there is evident danger in entering the port[16]." Great Britain acceded to this definition of a blockaded port in her Convention with Russia on 17 Jan. 1801[17], and the principles generally affirmed by the European Powers

[14] The Betsey, 1 Ch. Rob. p. 93. The Mercurius, 1 Ch. Rob. p. 82.

[15] Declaration of 28 Feb. 1780. Martens, Récueil, Tom. III. p. 158.

[16] Que pour déterminer ce qui caractérise un port bloqué, on n'accord cette dénomination qu'à celui, où il y a, par la disposition de la Puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.

[17] Martens, Récueil, T. VII. p. 260.

during the present century may be said to be in harmony with it. Thus at the outset of the war with Russia in 1854, France and England may be considered to have affirmed the same principle, which was maintained by the Armed Neutrality, when they declared their intention "to maintain the right of a belligerent to prevent neutrals from breaking any effective blockade, which may be established with an adequate force against the enemy's ports, harbours, or coasts." Upon the conclusion of peace with Russia the subject of Belligerent Blockade came under the consideration of the Powers assembled at Paris in the Congress of 1856, when it was agreed to remove all uncertainty amongst themselves by declaring their view of the Law Maritime on this subject, and by inviting all other Nations to accede to a common Declaration. The proposition which was accordingly adopted by the Congress was to this effect: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy[18]."

Declaration of the Congress of Paris.

§ 103. If it be assumed, that there is now an established Concert amongst the European Powers with the exception of Spain[19] on the subject of a binding Blockade, and that the business of European Courts of Prize in the majority of cases will henceforth be to ascertain whether an asserted Blockade is maintained in a manner which satisfies the Declaration of the Congress of Paris, it will be of importance to consider what is the meaning to

[18] Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi. Martens, N. R. Gen. XV. p. 792. The English text is taken from a paper presented to both Houses of Parliament in 1856.

[19] Spain has not acceded hitherto to the Declaration of Paris.

be fairly attached to the words "sufficient really to prevent access to the coast of the enemy," and whether there are any judicial decisions which will guide us in arriving at a just interpretation of those words. An analogous question came under the consideration of the High Court of Admiralty of England in the case of the Franciska[20] (25 Jan. 1855), when Dr. Lushington was called upon to determine, whether the blockade imposed upon the port of Riga was an Effective Blockade. That learned Judge, after observing that all definitions are and must be from the nature of blockades loose and uncertain, goes on to say, "The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention nor indeed more opposed to my notions of the Law of Nations than any relaxation of the rule, that a blockade must be sufficiently maintained: but it is perfectly obvious, that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence I believe that in every case the enquiry has been, whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert, that in no case was a blockade held to be void, when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron."

Characteristics of an effective blockade.

The circumstance of one or two vessels being

[20] The Franciska. Spinks, Ecclesiastical and Admiralty Reports, II. p. 128.

successful in eluding the vigilance of a blockading squadron has never hitherto been held sufficient to rebut the presumption of law arising from the fact, that a squadron adequate in point of numbers to command all the approaches to a fort has been stationed before it, nor has the accidental absence of a blockading squadron from its cruising ground from stress of weather ever been adjudged to work a legal suspension of an actual Blockade. Lord Stowell has observed that when a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue for many months without being liable to such temporary interruptions[21]. But when a blockading squadron is driven off by a superior force, a new course of events may arise, which may tend to a very different disposition of the blockading force, and which introduces a very different train of presumptions in favour of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or conjecture, that the blockade will be resumed[22]. So if a blockading squadron should be despatched upon an expedition elsewhere, leaving only a small force to continue the blockade and to apprise vessels of its existence, such a measure has been held to be insufficient to maintain the blockade, as it is the duty of the blockading Power to keep such a force on the ground, as would be of itself sufficient to enforce the blockade. The Lords of Appeal held in the case of an alleged breach of

[21] The Columbia, 1 Ch. Rob. p. 156.

[22] The Hoffnung, Schmidt. 6 Ch. Rob. p. 117.

the blockade of the island of Martinique, that the omission to keep a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, was a neglect which necessarily led neutral vessels to believe that those ports might be entered without incurring any risk[23]. The periodical appearance of a vessel of war in the offing could not be supposed to be a continuation of a blockade, which had been previously maintained by a number of vessels, and with such rigour that no vessel whatever had been able to enter the island during its continuance. On the other hand, Sir W. Grant held that under particular circumstances a single vessel may be adequate to maintain the blockade of one port and cooperate with other vessels at the same time in the blockade of another neighbouring port[24]; and likewise that the temporary absence of the blockading vessels from their station, whilst employed in chasing suspicious vessels, was no interruption of the blockade[25].

Knowledge on the part of the master of a vessel dispenses with actual warning.

§ 104. The second question which demands consideration, is what shall be taken to establish a knowledge of the blockade on the part of the master of a vessel attempting to enter or come out of a blockaded port. It is obvious that, as all questions of International Right presume good Faith, a knowledge of the fact of a blockade, howsoever acquired, will preclude a neutral master from any claim to receive a direct warning from the blockading squadron[26], even if the vessel should have sailed from the port, where she had shipped her cargo, without a

[23] The Nancy, Hurd. 1 Acton, p. 58.

[24] The Nancy, Woodberry. Ibid. p. 63.

[25] The Eagle, 1 Acton, p. 65.

[26] The Franciska. Spinks, Eccl. and Admiralty Reports, II. p. 113.

knowledge of the blockade. Thus by Article XVIII of the Treaty of Commerce between Great Britain and the United States of America[27] (19 Nov. 1794) it was provided that "Whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the place is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, confiscated, unless after notice." Lord Stowell was called upon to interpret this Treaty in dealing with the case of an American vessel taken in a voyage from Hamburg to Amsterdam, which latter port was under blockade. It appeared that the vessel had sailed from America with innocent intentions on the part of the owners, for it was not known at that time in America, that Amsterdam was in a state of investment. It was therefore contended on behalf of the owners, that under the Treaty with Great Britain, the vessel could not be confiscated for breach of blockade, unless she had attempted to enter the port of Amsterdam after notice that it was under blockade. "It has been said," observed Lord Stowell, in the course of his judgment, "that by the American Treaty, there must be previous warning. Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required[28]. The Master, the Consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of this

[27] Martens, Récueil, V. p. 676.

[28] The Columbia, 1 Ch. Rob. p. 154. Fitzsimmons *v.* The Newport Insurance Company, 4 Cranch, p. 185.

blockade, and therefore they are not in the situation which the Treaty supposes". The Lords of Appeal have on a recent occasion affirmed Lord Stowell's view with this caution, that there must be no reasonable doubt of the fact, from which the knowledge of the master is to be presumed. "While their Lordships," they said, "are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron; yet the fact, with notice of which the individual is to be fixed, must be one which admits of no reasonable doubt. Any communication which brings it to the knowledge of the party, to use the language of Lord Stowell in the Rolla (6 Ch. Rob. p. 367) in a way which could leave no doubt in his mind as to the authenticity of the information, will be binding on him[29]."

Constructive notice.

§ 105. But there are cases in which no actual proof may be forthcoming from the ship's papers or otherwise against the Master and crew of a neutral vessel of their personal knowledge of the fact of a blockade, and yet there may be established against them a constructive knowledge, which will preclude them from setting up in their defence personal ignorance. Thus it has been held by the British Prize Courts, that where there has been a public Notification of a blockade from the Government of a belligerent to a neutral State, all the subjects of the latter must after a reasonable time[30] be supposed to be cognisant of the blockade. To

[29] Northcote *v* Douglas (The Franciska). 10 Moore's P. C. Reports, p. 58.

[30] The Neptunus, 2 Ch. Rob. p. 111. The Spes and Irene, 5 Ch. Rob. p. 79.

allow individuals to plead ignorance of a blockade, which had been notified to their Government, would entirely defeat the object of the Notification. "The effect of a Notification to any foreign Government," says Lord Stowell[31], "would clearly be to include all the individuals of that Nation: it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign Governments to communicate the information to their Subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a Notification of a blockade, that he is ignorant of it." Such being the Law of the English Admiralty Courts in regard to the Subjects of States, to which a direct Notification of a blockade has been addressed, those Courts have further held that the Notification of a blockade from the Government of a State made to the principal States of Europe, will in time affect the rest, not so much *proprio vigore*, as in the way of evidence against them. The general notoriety of a blockade will therefore be presumed after it has been publicly notified and *de facto* maintained for a considerable time; and the English Prize Courts have held, that it would be a fraudulent omission on the part of a neutral master not to take notice of a matter, which was a subject of general notoriety in the port where he shipped his cargo, although it might not have been formally notified to his own Government. It was amongst the points insisted upon by the States General in their Ordinance of 26 June 1630, that the ports of Flanders were not merely blockaded *de facto*, but were *reputed* to be under blockade by the Dutch fleets. The necessity therefore of giving notice on the spot to vessels

Public Notification.

General Notoriety.

[31] The Adelaide, 2 Ch. Rob. p. 111 in notis.

entering a blockaded port, before they can be justly made liable to the consequences of breaking the blockade, does not arise, when the blockade has been notified in a public and solemn manner by a Declaration on the part of the executive Government to foreign Powers. Where, on the other hand, the blockade is established by the commander of a squadron without any public Notification on the part of his Government, the notoriety of the fact of an actual blockade will not be presumed against the master of a neutral vessel, so as to disentitle him from the benefit of an actual notice from the blockading force on his arrival in the neighbourhood of the blockaded port. Thus the instructions transmitted by the Lords of the Admiralty on 8 January 1804 to Commodore Hood in regard to the blockade of the islands of Martinique and Guadaloupe were, that he was not to consider any blockade of those islands as existing, unless in respect of particular ports, which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them[32]. It is otherwise however with vessels coming out of a blockaded port. There no notice is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice, as it is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing in this case supersedes the necessity of particular notice to each ship[33].

§ 106. M. Hautefeuille[34] discusses the blockade *by notification* and the blockade *by notoriety*, as if

The Fact of a blockade must accord with the Notification.

[32] Tutela, 6 Ch. Rob. p. 179.

[33] The Vrow Judith, 1 Ch. Rob. p. 153.

[34] Des Droits des Nations Neutres, Tit. IX. c. 5. § 1. and 2.

they were varieties of *paper blockades* or fictitious blockades; but such is not the meaning of those terms as employed in the English Courts of Admiralty. The Lords of Appeal in Prize cases have long since held that a proclamation of blockade is not in itself sufficient to constitute a legal blockade[35]. Thus the West India islands were declared under blockade by Admiral Jarvis, but the Lords held that as *the fact* did not support *the declaration*, a blockade could not be deemed legally to exist[36]; and on a recent occasion during the Russian War (30 Nov. 1855) the Judicial Committee of the Privy Council held that the notice of a blockade must not be more extensive than the blockade itself, otherwise the neutral will be at liberty to disregard such notice, and will not be liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which is really blockaded[37]. To the same effect Lord Stowell has observed, "There are two sorts of blockade; one by the simple fact only; the other by notification, accompanied with the fact[38]." It would be an error to suppose that the British Courts of Admiralty admit that the mere Notification of a blockade is sufficient to constitute a legal blockade: there must be likewise a blockade *de facto* at the time of Notification, otherwise the Notification will not have any legal effect. Such was the view of the British Government, as expressed by them in a note communicated to the Government of the United States of America in 1807, by its Minister, Mr. Forster, on the subject of the blockade of 1806 and 1807. "Great Britain," they said, "has never

[35] The Betsey, 1 Ch. Rob. p. 95.

[36] The Mercurius, 1 Ch. Rob. p. 83.

[37] Northcote *v.* Douglas (The Franciska), 10 Moore, P. C. Reports, p. 59.

[38] The Neptunus, 1 Ch. Rob. p. 171.

contested, that according to the customary Law of Nations every blockade, in order that it should be justified, ought to be maintained by a sufficient force, and should place in danger every vessel that shall attempt to evade it. It was in accordance with this principle that the blockade of 1806 was not notified to foreign Powers by Mr. Fox, until after he had been convinced by a Report from the Board of Admiralty, that the Admiralty had adopted and would employ every means to watch the coast from Brest to the Elbe, and to place this blockade really in execution. The blockade therefore of the month of May 1806, was full and legitimate in its origin, since it was maintained not merely in *intention*, but in *fact* by a sufficient force[39]."

Practice of the French Courts as to notice.

§ 107. The substantial difference which the British Courts make between a blockade which has been notified to neutral Governments, and a blockade which has not been so notified, is, that vessels in the former case are not entitled to a direct warning from the blockading squadron, before they can be captured as Prize of War for violating the blockade. On the other hand, the French Courts are more lenient on the subject of direct warning; for the practice of the French Government[40] is to instruct their cruisers to give actual notice on the spot to all parties attempting for the first time to enter a port which has

[39] A French version of this note, of which the above is a translation, is given by M. Hautefeuille, Tom. II. p. 257. The same doctrine was maintained in a note from Lords Holland and Auckland, the British Plenipotentiaries, addressed to Messrs. Monroe and Pinckney, the United States' Commissioners, 31 Dec. 1806. Papers presented to Parliament in 1808.

[40] The ancient practice was more rigorous, if we may judge from the Règlement of 26 July 1778, (Lebeau, Tom. II. p. 58.) under which French privateers were authorised to capture all neutral vessels, "qui porteroient des secours à des places bloquées, investées, ou assiégées," no mention being made of a preliminary warning.

been placed under blockade, even where the blockade itself has been a subject of diplomatic Notification to neutral States. Such was the substance of the instructions given to the French cruisers both in 1827 and in 1830, when they established a blockade of the ports of the Regency of Algiers. Such also was the purport of the instructions contained in the Letter of Count Molé of 20th October 1838, which he addressed to the French Minister of Marine for the information of the commander of the French squadron then blockading the ports of Mexico[41]. M. Molé, in a despatch of 17th of May 1838, in reference to the blockade of the ports of the Argentine Republic, has stated very clearly the principles upon which the French Courts of Prize proceed: "Tout blocus pour être valable envers les neutres, doit leur avoir été notifié et être effectif.

"Un navire, se présentant devant un pour bloqué avant d'avoir eu connoissance de blocus, doit d'abord en être averti, et la notification doit en être faite par écrit, et sur son rôle d'équipage. Mais cet avis ayant été donné, et cette formalité ayant été remplie, s'il persiste à entrer dans le port, ou s'il vient à s'y présenter de nouveau, le commandant du blocus a le droit de l'arrêter[42]."

In accordance with the above rules, we find the French Courts of Prize deciding on 21 Dec. 1847, in the case of La Louisa[43], captured in the waters of the River Plata, that it was not sufficient that the blockade should have been notified to foreign Powers: it was necessary that the ship itself should have notice of the existence and extent of the blockade,

[41] This letter is given *in extenso* by M. Ortolan, in his Diplomatie de la Mer, Tom. II. p. 304.

[42] Pistoye et Duverdy, Traité des Prises Maritimes, Tom. I. p. 382.

[43] Ibid. p. 382.

and that the notice should be entered on the ship's log before she could be captured and condemned as prize of war for violation of the blockade. On the other hand, the same Courts on 4 March 1830 condemned the vessel La Carolina[44], as good prize, seeing that there had been an effective blockade of the ports of the Regency of Algiers established since the month of May 1827 in virtue of orders transmitted from the French Government; and that the master of the Carolina had been warned of the existence of the blockade some days before the capture of his vessel, and a notice to that effect had been entered in the log of the vessel; and that after this direct warning, he had attempted to break the blockade, and enter the port of Oran."

Practice of the United States Courts as to notice.

§ 108. The doctrine of the British Courts of Prize, that due notice of a blockade may be received constructively, has been adopted by the jurists of the United States of America. Thus Chancellor Kent writes[45]: "It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways; either actually by a formal notice from the blockading Power, or constructively by notice to his Government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it. A notice to a foreign Government is a notice to all the individuals of that Nation, and they are not permitted to aver ignorance of it, because it is the duty of the neutral Government to communicate the Notice to its people.

[44] Pistoye et Duverdy, Prises Maritimes, Tom. I. p. 381.

[45] Commentaries on American Law, Tom. I. p. 147.

In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified, and one without such notice, that in the former case the act of sailing for the blockaded place with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination[46]. The question of notice is a question of evidence to be determined by the facts applicable to the case. The notoriety of a blockade is of itself sufficient notice of it to vessels lying within the blockaded port[47]."

Violation of a blockade.

§ 109. The third question to be considered is what conduct renders a neutral vessel liable to capture and condemnation for violating a blockade. By the second article of the Ordinance of the States General of the United Provinces, issued on 26 June 1630, already referred to, it was provided "that neutral vessels and their cargoes should be confiscated, when it shall be found from their cargo-papers or other documents that they have been laden in the blockaded ports, or are destined to go to such ports, although they should be found at such a distance from them, that they might possibly change their voyage and intention. This rule being founded on the fact that they have already embarked upon an illicit enterprise and put it in train of execution, although they have not completed it nor brought it to

[46] The Columbia, 1 Ch. Rob. p. 130.

[47] The Neptunus, 2 Ch. Rob. p. 110.

the last point of perfection, the only exception to it can be permitted, when the masters and owners of such vessels can duly show, that they have desisted of their own accord from their enterprise and illicit voyage, before any vessel of war came in sight of them or gave chase to them[48]." The English and American Courts of Prize proceed in the present day upon the principles maintained by the States General in regard to vessels, which have once set sail with an intention to enter a port known to the masters of such vessels to be under blockade. "It has been said," observed Lord Stowell[49], "that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade of the Texel was beginning to execute that intention; and is an overt act constituting the offence. From that moment the blockade is fraudulently evaded." In commenting upon this and other judgments of the English Courts, that eminent American Judge, Chief-Justice Marshall, has observed, "Neither the Law of Nations nor the Treaty (between the United States and Great Britain) admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the fact of sailing is coupled with the intention, and the sentence of condemnation is

[48] Robinson's Collectanea Maritima, p. 165. Bynkershoek, Qu. Jur. Publ. L. I. c. 11.

[49] The Columbia, 1 Ch. Rob p. 155. Cf. Madeiros *v.* Hill 8 Bingham, p. 231.

founded on an actual breach of the blockade[50]." The same learned Judge in another case[51] observed that "sailing from Tobago to Curaçoa, knowing Curaçoa to be blockaded, would have incurred the risk of breaking the blockade; but sailing for that port without such knowledge did not incur it."

The rule of the English Courts in considering the act of sailing for a blockaded port to be in law an attempt to enter it, is a peremptory rule in the case of a blockade, which has been notified by the belligerent Government to neutral Governments, inasmuch as, in the case of a blockade which has been publicly notified, the parties despatching the ship are not entitled to presume that the blockade has been raised, unless the revocation of the blockade has also been publicly notified[52].

Equity of British Prize Courts.

§ 110. A certain equity has been administered by the English Prize Courts towards vessels which have been despatched from a port very distant from the blockaded port. Thus Lord Stowell held that American vessels were entitled to the benefit of a contingent destination to be ascertained and rendered definite by the information, which they should receive in Europe. "It must be inferred," he says, "and indeed admitted, that the Notification of the blockade of Havre had been received in America. To all general rules of observance of a blockade duly imposed, the subjects of America are undoubtedly bound equally with those of other countries. At the same time, looking to the great distance at which they are placed, and being unwilling to press with any

[50] Fitzsimmons *v.* The Newport Insurance Company, 4 Cranch, p. 185.

[51] Yeaton *v.* Fry, 5 Cranch, p. 335. Cf. The Nereide, 9 Cranch, p. 446. Kent's Commentaries, Tom. I. p. 150.

[52] The Vrow Johanna, 4 Ch. Rob. p. 109.

degree of hardship on the fair convenience of commerce, the Court has held, even when the blockade of a port in Europe has been notified in America, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition that before the arrival of the vessel a relaxation might have taken place. But as to the line of caution to be observed in this state of uncertainty, the Court has always expected that the enquiry should be made at some of the British ports in the Channel. It could not be, that ships should be permitted to resort to the ports of the blockaded country for the information, since every one must perceive that such a liberty would place it in the power of the enemy to determine the continuance of the blockade. The ports of the blockading country are certainly the proper ports for enquiry; and it would not be too much to expect, that this precaution should be noted in the papers, and that it should be most explicitly enjoined on the master and supercargo in their instructions to obtain the information, which might be necessary to fix the destination, at some of the British ports in the Channel[53]."

In another case[54] Lord Stowell declared it "to be a measure of necessary caution and of preventive legal policy to hold the rule general against the liberty of enquiring at the very mouth of the blockaded port, as such a liberty would amount in practice to an universal license to enter, and on being prevented to claim the liberty to go elsewhere." On the other hand, the Lords of Appeal in Prize Causes have ruled that it was not a necessary ground for condemnation, that the captain of an American vessel had instruc-

[53] The Shepherdess, 5 Ch. Rob. p. 265. The Betsey, 1 Ch. Rob. p. 335.

[54] The Spes and Irene, 5 Ch. Rob. p. 81. Cf. The Posten, 1 Ch. Rob. note, p. 336.

tions to make enquiry of the cruising vessels off the Eyder respecting the existence of the blockade of the River Elbe[55], and that he had not, in fact, made enquiry during the prosecution of his voyage up the Channel in some British Port. They have also ruled that the captain of an American vessel might be instructed to go to Heligoland for a pilot, and there make enquiry if the blockade of the Weser was raised, without thereby exposing his vessel to condemnation for violation of the blockade. But the Lords of Appeal have held in all such cases that, in order to entitle the claimants to the favourable consideration of the Prize Tribunal, the strictest proof of *bonâ fides* is required, as the presumption of law in the absence of such proof would be adverse to the claimant of the ship and cargo[56].

§ 111. After the blockade of a port has once been established, every neutral vessel, the master of which voluntarily attempts to enter the port with his vessel either in ballast, or in cargo, without a license from the Government of the blockading Power, is liable to capture and condemnation for breach of the blockade. A license, however, which is expressed in general terms, to authorise a ship to sail from any port in the Baltic with a cargo, will not authorise the same vessel to sail from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade it must be specially designated with such an exemption in the license; otherwise a blockaded port will be taken as an exception to the general description in the license[57]. Licenses however are to be favourably regarded; and it imports the honour and good faith of a Government

Favourable Construction of Licenses.

[55] The Little William, Acton, p. 141.

[56] The Dispatch, Ibid. p. 163.

[57] The Byfield, Edwards, p. 188.

which grants them, not to press the *letter* of them too rigorously. Thus a license to go to the ports of the Vlie, Embden, Rotterdam, or elsewhere, was granted by the British Government to an American vessel, which on arriving at Falmouth had found that the port of Amsterdam was under blockade. It was held by Lord Stowell[58] that the license must be taken to include Amsterdam, as being one of the ports of the Vlie. So a license granted to import Spanish wool from Holland, dated on the day of the date of the Notification of the blockade of Holland, was interpreted to give the parties the full benefit of importing such articles without molestation from the blockading squadron[59]. If however the master of a neutral vessel should have been involuntarily driven to enter a blockaded port by stress of weather, or want of provisions[60], or need of water, or by some other imperative and overruling necessity, such necessity will excuse him from the charge of violating the blockade, if his vessel should be captured. But it will not be sufficient for him in such a case to show that there were existing and adequate causes to explain the circumstance of his vessel seeking refuge in the blockaded port; it must be established beyond a doubt, that the vessel under the circumstances could not have proceeded without hazard to any other port than the blockaded port[61], in other words, that the necessity was imperative.

Breach of blockade by egress.

§ 112. A vessel coming out of a blockaded port is *prima facie* liable to seizure, and if the cargo has been taken on board since the commencement of the

[58] The Juno, 2 Ch. Rob. p. 116.

[59] The Hoffnung, 2 Ch. Rob. p. 162.

[60] The Fortuna, 6 Ch. Rob. p. 27.

[61] The Hurtige Hane, 2 Ch. Rob. p. 127. The Arthur, Edwards, p. 263. The Charlotta, Ibid. p. 232.

blockade, both ship and cargo will be liable to condemnation[62]. "A blockade," says Lord Stowell, "is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel, is, that having already taken on board a cargo, before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this Court means to apply, that a neutral ship, departing, can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade[63]." The United States' Courts have held the same doctrine[64]. Further, it is not necessary, that the whole of the cargo should be laden on board after the blockade has commenced, in order to render the departure of the vessel from the blockaded port an unlawful act. When any portion of the cargo has been taken on board after the existence of the blockade is known in the port, the act of egress is treated as a fraud against the right of the belligerent. This rule of the Prize Courts is founded on the principle, that the interposition of a neutral in any way to assist in exporting goods from an enemy's port, after a blockade of that port has been established, tends directly to relieve the enemy

[62] The Frederick Molke, 1 Ch. Rob. p. 86.

[63] The Vrow Judith, 1 Ch. Rob. p. 152. The Comet, Edwards, p. 33.

[64] Oliveira *v.* Union Insurance Company, 3 Wheaton, p. 183.

from the distress which the blockade was intended to create, and that the continuing to take in cargo, after the time when the master of the neutral vessel was bound to take notice of the blockade, is inconsistent with good faith towards the blockading power[65].

Egress lawful in certain cases.

§ 113. It has been already observed that neutral vessels, which have entered an enemy's port before that port has been placed under blockade, may come out in ballast without violating the blockade, for their egress under those conditions cannot in any way prejudice the blockading power[66]; and neutral vessels may also come out of a blockaded port without violating the blockade, if they have been compelled to enter it, after the blockade has been established, from stress of weather or other imperative necessity. Neutral vessels are also at liberty to come out without molestation, if they have entered the port under the authority of a license from the Government of the blockading Power; for such license to enter the port implies a permission to come out of it[67]. Again, a neutral vessel does not violate a blockade by reshipping and bringing out of a blockaded port goods which have been sent into the port before the blockade by a neutral merchant for sale, and which have been found unsaleable, and are *bonâ fide* withdrawn by the owner[68]. Again, a neutral vessel may take on board, and bring out after the commencement of a blockade a cargo, which has been purchased by a neutral merchant from the enemy during the blockade, if there be a well-founded expectation of an immediate war between the country of the neutral

[65] The Calypso, 2 Ch. Rob. p. 298.

[66] The Juno, 2 Ch. Rob. p. 119.

[67] The Charlotta, Edwards, p. 252.

[68] The Juffrow Maria Schroeder, in notis, 4 Ch. Rob. p. 89.

merchant and that to which the blockaded port belongs, and consequently the danger of the seizure and confiscation of the property in port is imminent[69]. Again if a neutral ship, arriving at the mouth of a blockaded port in ignorance of the blockade, is suffered to pass into the port, she may freely come out in ballast, for she has entered the port under an implied permission which fully protects her egress[70]. Or if a vessel, of which the master has sailed with a knowledge of a blockade, is directly permitted by the blockading squadron to enter a blockaded port[71], or having been informed by a cruiser of the belligerent Power that the blockade has been raised, thereupon makes her way without molestation into the blockaded port, the vessel is entitled to free egress from the same port[72]. In the case of the Rose in Bloom[73], Lord Stowell intimated, that if a vessel, sailing out of a blockaded port of France under American colours, had been employed by the American Consul resident in the port for the sole purpose of taking home distressed American seamen, who had been thrown out of employment and detained in the ports of France by the violence of the ruling Power there, she would have been entitled to a very favourable consideration from the blockading Power, whose Courts of Prize, from motives of humanity, might reasonably allow such a case to be an exception to the general rule.

Duration of *delictum* after egress.

§ 114. If a neutral vessel has violated a blockade by egress, she is regarded as still *in delicto* until she has reached her port of destination, and has completed

[69] The Drie Vrienden, 1 Dodson, p. 269.

[70] The Christina Margaretta, 6 Ch. Rob. p. 63.

[71] The Juffrow Maria Schroeder, 3 Ch. Rob. p. 149. The Vrow Barbara, ibid. in notis, p. 158.

[72] The Neptunus, 2 Ch. Rob. p. 110.

[73] The Rose in Bloom, 1 Dodson, p. 58.

her voyage[74]. Thus we find it directed by the third article of the Ordinance of the States General of 26 June 1630, above referred to, that "vessels returning from the ports of Flanders, with the exception of such as have been driven into them by an extreme necessity, although they should be met with at a great distance from those ports by vessels of the State without having been previously pursued by any of the blockading fleet, shall be confiscated, because such vessels are held to have been taken in the fact as long as they have not completed their voyage, and have not arrived in some port which is free or belonging to a neutral Prince. Such vessels indeed with their cargoes shall not be liable to be confiscated, if they shall have arrived in any such port as specified, unless they have been pursued in coming out of the ports of Flanders by some vessel of war, and have taken refuge in such port, not being their own port nor the port of their destination, and shall have ventured out to sea again and been captured on the high seas." Bynkershoek[75], in commenting on this Ordinance of the States General observes, that the exception in favour of a vessel which has arrived at her own port, if it is intended to distinguish such a port from her port of destination, is not reasonable. "A British vessel," he says, "which has come out of a blockaded port of Flanders, destined to a Danish port, and having taken refuge from the pursuit of the blockading squadron in a British port, afterwards ventures out to sea and pursues her original destination to a Danish port, appears to be still *in itinere et ipso actu.*" He is therefore disposed to construe the Dutch Ordinance, as granting the exemption to vessels

[74] The Weelvaart Van Pillaw, 2 Ch. Rob. p. 128. The General Hamilton, 6 Ch. Rob. p. 61.

[75] Quæstiones Jur. Publ. L. I. c. 11.

which had arrived in their own port as the *terminus* of their voyage; and he cites a decision of the Admiralty Court of Zealand (27 Jan. 1631) in regard to a vessel which had been purchased by a Scotchman in the port of Dunkirk, which was at such time under blockade, and which escaped out of Dunkirk and took refuge from pursuit in the port of Yarmouth, which was not her actual port of destination. On venturing out of Yarmouth in prosecution of her original voyage the vessel was captured on the High Seas by a Dutch cruiser, and was condemned as good prize to the captors. So likewise Lord Stowell, in dealing with the case of a Prussian ship which had escaped out of the port of Amsterdam, then under blockade, and had been captured by a British cruiser off Dungeness, observed that, if the principle is sound that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, he knew no other natural termination of the offence but the end of the voyage. "It would be ridiculous to say, If you can get past the blockading force, you are free: this would be a most absurd application of the principle. If that is sound, it must be carried to the extent that I have mentioned, for I see no other point at which it can be terminated. Being of opinion that the principle is sound, I shall hold that if a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and is subject to confiscation[76]." Lord Stowell has further laid it down, that a vessel which has committed a breach of blockade by egress, shall not have her offence purged by being driven by stress of weather into a port, which is not her port of destination. Such an accident, he says, is not entitled to

[76] The Weelvaart Van Pillaw, 2 Ch. Rob. p. 130.

be considered as any discontinuance of the voyage, or as a defeasance of the penalty which has been incurred[77].

§ 115. An exception to the rule, that the offence of violating a blockade by egress is purged upon the arrival of the vessel at her port of destination, was made by Lord Stowell in a case which was altogether novel, but of which the importance was considerable, when viewed in the extent of the consequences to which it might lead. A neutral vessel was blockaded in the port of Rotterdam, and could only come out under the indulgence of a British Order in Council, which made an exception in favour of vessels bound to a neutral port. She came out in cargo with an ostensible destination to the neutral port of Smyrna, but on her voyage she put into Alicant in Spain under pretext of requiring repairs; and then having sold her cargo, took on board a return cargo for Copenhagen. She was captured by a British cruiser on her return voyage, and the ship and cargo were condemned as prize to the captor. Lord Stowell, in considering this case, observed, that "she was in fact blockaded in the port of Rotterdam, and could not come out with a cargo, unless going to a neutral port. The permission to go to a neutral port, if accepted, implies a contract that that destination shall be *bonâ fide* pursued. The vessel avails herself of the indulgence, and comes out with a professed intention of acting conformably to the Order. But the fact turns out, that she deposits her cargo in a port, to which she would not have been permitted to go, if the real intention of the voyage had been disclosed. This is unquestionably an act of perfidy; and I ask by what means can the Order be maintained,

Effect of fraud in egress.

[77] The General Hamilton, 6 Ch. Rob. p. 62.

or such conduct be repressed, unless by the application of the penalty to the subsequent voyage. Until the vessel had actually entered an interdicted port, nothing appeared whether she was *in delicto* or not. Cruisers see nothing; she goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this Order[78]." This case may be regarded as analogous in some respects to a breach of blockade by ingress, in which there is no opportunity of enforcing a penalty until the offending vessel ventures out again to sea. There is however one case in which the offence of entering a blockaded port may be purged before the vessel comes out, and in which likewise the penalty of violating a blockade by egress may be determined, before the offending vessel has reached her port of destination. This case arises, whenever the blockade itself is raised. Lord Stowell observed, in the case of the Lisette, that he knew of no case in which a vessel had been condemned, which had been seized for the breach of a bygone blockade. The same reason for rigour in such a case no longer exists, because, the blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*[79].

Cargo not always condemned with the ship.

§ 116. It is a general rule that both ship and cargo are confiscable for the breach of a blockade, and the presumption of law is that the violation of a blockade is intended for the benefit of the cargo as well as of the ship, and takes place with the sanction of the

[78] The Christianberg, 6 Ch. Rob. p. 381.

[79] The Lisette, 6 Ch. Rob. p. 392.

owners of both[80]. This presumption, unless it be rebutted by documents found on board of the ship when captured, is a *præsumptio juris et de jure*, which excludes all other evidence to the contrary. In cases where the ship and cargo belong to the same individuals, it is obvious that no difficulty can arise, for the act of the master, as the legal agent of the owner of the ship, will affect his principal to the extent of the whole of his property concerned in the transaction[81]. On the other hand, where the ship and the cargo are the properties of different individuals, the reasonable conclusion is, that the master of the ship does not hazard the interests of his vessel except in the service of the cargo. There is a necessary presumption also in such cases, that this is done with the cognisance and at the instigation of the owner of the cargo[82]. But it may happen that the fact of a blockade is known to the master of a ship, but not to the owner of the cargo; as for instance, a vessel may have begun her voyage when the blockade of her port of destination did not exist, or when it was unknown to the owners of the cargo; and it may happen that the master, having been informed of the blockade during his voyage, or having been warned off at the entrance of the blockaded port, has persisted in pursuing his course to his original destination. In such a case no question of fact can arise, whether the owner of the cargo was consentient to the breach of the blockade[83]. Other cases may be supposed; as for instance where a vessel has been despatched in ballast to fetch a cargo from a port, which is placed under blockade after she has entered

[80] The Alexander, 4 Ch. Rob. p. 93.

[81] The Columbia, 1 Ch. Rob. p. 154, affirmed on appeal, 12 August 1801.

[82] The Adonis, 5 Ch. Rob. p. 261. The Alexander, 4 Ch. Rob. p. 93.

[83] The Adonis, 5 Ch. Rob. p. 262.

the port, and the owner of the cargo has no opportunity of ascertaining the fact of the blockade, so as to countermand the shipment of his cargo[84]. In such a case, Lord Stowell has observed, that it would be hard to bind the owners of the cargo by the act of her agents in the blockaded port, as they do not stand in the same situation as other agents. They have not only a distinct, but even an opposite interest from that of their principal, namely, to fulfil the commission at all risks as rapidly as possible, for their own private advantage and for the public interests of their country, at such a time under particular pressure as to the exportation of its produce. This may be fairly allowed to impose a strong obligation on the candour of the Court not to hold an employer too strictly bound on mere general principles by an agent, who may be actuated by interests different from those of his principal[85]

Extent of coast which may be placed under blockade.

§ 117. There is no limit to the extent of coast along which the blockade of an enemy's ports may be extended, short of the natural limit of a force adequate to maintain the blockade really and effectively. The British Government in 1806 declared the ports of the Continent of Europe, from Brest to the River Elbe, to be under blockade. In the circular note bearing date 16 May 1806, and addressed to the Ministers of Neutral Governments then resident in London, Mr. Fox, the British Secretary of State for Foreign Affairs, announced "that a consideration of the novel method, adopted by the enemy for the interruption of British commerce, had determined the British Government to issue orders for placing in a state of blockade all the coasts, rivers,

[84] The Neptunus, 3 Ch. Rob. p. 173. The Adelaide, Ibid. p. 177. 281.

[85] The Neptunus, 3 Ch. Rob.

and ports, from the Elbe to Brest inclusively, and that these rivers and ports were accordingly to be considered as actually blockaded[86]." On this occasion the British Government maintained that the blockade was not notified to Foreign Governments, until the necessary measures had been adopted by the British Admiralty to make the blockade effective[87], and that the blockade itself was maintained by a force sufficient to make the entrance into the ports along the line of coast, included within the limits of the blockade, manifestly dangerous. If it be assumed, as a matter of fact, that these conditions were fulfilled, there can be no doubt that the lawfulness of the blockade was not in any way affected by the great extent of coast over which it was maintained. In the war carried on by the United States of America against Mexico in 1846, all the ports, harbours, bays, outlets, and inlets, on the West Coast of Mexico south of San Diego, were declared by Commodore Stockton to be under blockade. The United States Government on this occasion, in reply to the suggestions of the British Government that such a proceeding savoured of a paper blockade, did not express any doubts of their Right to maintain so extensive a blockade; but they stated that under Commodore Stockton's general Notification no port on the West Coast was regarded as blockaded, unless there was a sufficient force to maintain it, actually present, or temporally driven from such actual presence by stress of weather, intending to return[88]. In the war de-

[86] Cf. Manning's Law of Nations, p. 332.

[87] Note presented by M. Forster, the British Minister, to the United States Government, in 1807. Hautefeuille, Des Nations Neutres, Tom. II. p. 257.

[88] Note from Mr. Buchanan, of 29 December 1846, to Sir Richard Pakenham, with its enclosure. Correspondence with the United States Government respecting blockade, presented to Parliament by command of her

clared on 28 March 1854, by the three Allied Powers, Great Britain, France, and the Ottoman Porte, against Russia, the combined fleets of Great Britain and France established a blockade of the whole of the Russian Ports in the Baltic and in the Gulfs of Finland and Bothnia. So likewise in the late war which was carried on by the Government of the United States of America against the States which seceded from the Federal Union in 1861, and formed themselves into a Confederation of States under the name of the Confederate States of America, the Government of the United States established a blockade of the whole of the ports on the seaboard of the Confederate States, and this blockade was enforced against all neutral vessels approaching that seaboard with the same rigour, as the blockade of a single port is entitled to be enforced under the Law of Nations.

On the other hand the penalties for breach of a blockade can only be applied to vessels engaged in trade with the ports of the blockaded coast. They cannot be extended to vessels carrying cargoes to ports, which are connected by an inland water-communication with the blockaded ports, nor to vessels carrying cargoes to ports, from which the cargoes are to be dispatched over land to the blockaded ports[89]. Thus Lord Stowell held that there would be no breach of the blockade of Amsterdam committed by a vessel carrying to Rotterdam or to Embden goods, which had an ulterior destination to Amsterdam by land or by an interior canal navigation. A blockading squadron can only apply its force to a blockaded port from the side of the sea. The internal

Majesty, 1861.

[89] The Ocean, 3 Ch. Rob. p. 298. The Jonge Pieter, 4 Ch. Rob. p. 83. The Frau Margaretha, 6 Ch. Rob. p. 92.

communications of a country are out of its reach, and in no way subject to its operation.

§ 118. It is competent for a belligerent Power to limit the operation of a blockade, provided that the limitation applies to all neutral Nations in an equal manner. Thus the Commanders of the French and British fleets established a blockade of the mouths of the Danube, with the object of preventing supplies being carried to any Russian port on that river. They accordingly forbade the vessels of all neutral Nations from entering the river. Limited operation of a blockade.

Nous sousignés, vice-amiraux, commandant en chef les forces navales combinées de France et d'Angleterre dans la Mer Noire, déclarons par la présente, au nom de nos gouvernements respectifs, et portons à la connoissance de tous ceux que la chose peut intéresser, que nous avons établi le blocus effectif du Danube, afin d'arrêter tout transport d'approvisionnements aux armées Russes.

Sont comprises dans ce blocus toutes celles des embouchures du Danube, qui communiquent avec la Mer Noire, et avertissons, par les présentes, tout batiment de toute Nation, qu'ils ne pourront entrer dans ce fleüve jusqu'à nouvel ordre.

Le Vice-Amiral, commandant en chef l'escadre française,
HAMELIN.

Le Vice-Amiral, commandant en chef l'escadre britannique,
G. W. D. DUNDAS[90].

Fait à Baltchik 1 *Juin*, 1854.

Again, on the occasion of Great Britain establishing a blockade of the ports of the continent of Europe from Brest to the river Elbe, that blockade was to be limited in its effect by a division of the line of coast into two parts, of which the part from Ostend to the river Seine was to be considered as under the most rigorous blockade, while the rest of the line was allowed to be open to the navigation

[90] Sammlung Officieller Actenstücke in Bezug auf Schiffahrt und Handel in Kriegszeiten. V. p. 13. Hamburg, 1854.

of neutral vessels laden with other goods than contraband of war or enemy's property, as long as those vessels had not been laden at a port belonging to or occupied by the enemies of Great Britain, or on the other hand were not proceeding to such port from the blockaded line, and provided those vessels had not previously violated the blockade[91]. This order was further restricted on 15 Sept. 1806 by a Notification, that the blockade was raised on that part of the line, which extended from the Elbe to the Ems inclusively.

Effect of a blockade on licenses.

§ 119. It was observed by Lord Stowell in the Byfield that a license expressed in general terms, which purports to authorise a vessel to carry a cargo into or out of any of the enemy's ports, will not authorise her to enter or come out of an enemy's port, which is under blockade. In order that a blockaded port should be exempted from the restrictions, which are incident to a state of blockade, it must be specially designated with such exemption in the license, otherwise a blockaded port shall be taken to be an exception to the general description in the license[92]. This *dictum* of Lord Stowell seems rather to conflict with the view taken by him at an earlier period in the case of the Hoffnung[93], when he held, that when a license had been granted to certain vessels, pursuant to a Power given to his Majesty in Council under an Act of Parliament, to import Spanish wool from ports of Holland, it operated to protect the parties acting under it from the effects of a blockade, which had been notified on the same day on which the license was granted. "I think,"

[91] Manning's Law of Nations, p. 332.

[92] The Byfield, Edwards, p. 188. 9 Dec. 1809.

[93] The Hoffnung, 2 Ch. Rob. p. 162. 20 Aug. 1799. The Juno, 2 Ch. Rob. p. 116.

he says on this occasion, "that I am bound to presume that it was intended the parties should have the full benefit of importing these articles without molestation from a blockade, which could not be unknown to the great Personage, under whose authority, and in whose name this license issued. I add further, that I think this license bears very materially on some other licenses which had been previously granted; for when I see that the blockade was not considered as a ground for withholding those licenses, I am led to suppose that it was not intended to have the effect of suspending the operation of such as had been already granted." Sir Alexander Croke, the learned Judge of the Vice-Admiralty Court of Halifax, in considering the mutual bearing of these two judgments of Lord Stowell upon each other, concluded that the *dictum* of Lord Stowell in the Byfield must be construed in connection with the particulars of the case, and that all which Lord Stowell decided in that case was, that as the Byfield was lying in an open port of the enemy at the time the license was granted to it, the subsequent transaction within a blockaded port, which it was sought to protect by the license, was not in contemplation, when the application for the license was made, and therefore the intention of the Government, which issued the license, to protect the transaction could not be presumed. Sir Alexander Grant accordingly held, that the judicial opinion expressed by Lord Stowell in the Hoffnung remains untouched by his decision in the Byfield; and that notwithstanding there is no express provision in a license or in a blockading order to that effect, yet whenever it appears to have been the *intention* of his Majesty or of those who exercise his authority,

that the permission given by a license should not be suspended by an order of blockade, it is not affected by a blockade[94]. To the same purport the Lords of Appeal in Prize Cases (the Judicial Committee of the Privy Council) decided in the case of the Franciska (30 Nov. 1855) that the Order in Council of 29 March 1854, under which "Russian merchant vessels in any ports or places of her Majesty's dominions should be allowed, until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, should be permitted to continue their voyage, if on examination of their papers it should appear that their cargoes were taken on board before the expiration of the above term: Provided that nothing therein contained should extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government," gave to all Russian vessels which did not come within any of the specified exceptions, full liberty to sail in security to their port of destination, although such port might be in a state of blockade[95].

Effect of licenses on a blockade.

§ 120. By the Law of Nations, "a belligerent may not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral Nations; and therefore no blockade can be legitimate that admits to either belligerent a

[94] The Orion, Stewart's Reports, p. 506. In this case Sir A. Croke held that a license to an enemy protected him in egress from a port subsequently blockaded, as the nature of the trade afforded a presumption of such being the intention of the license.

[95] The Franciska, 10 Moore, P. C. p. 55.

freedom of commerce denied to the subjects of States not engaged in the war. The foundation of this principle is clear, and is rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations in the nature of trade being by war itself suspended[96]." Such is the forcible language of Dr. Lushington in the case of the Franciska. To this principle the Lords of Appeal (the Judicial Committee) gave their full adhesion, and in applying it to the state of things arising out of the British orders in Council, issued at the commencement of the war with Russia, under which free ingress into Russian ports for a certain time was granted to Russian vessels sailing from ports in the British dominions, and free egress from Russian ports for a certain time was granted to Russian vessels bound with cargoes to British ports, they held that during such interval of time, as was covered by these Orders in Council, no valid blockade of the Russian ports in the Baltic could be established by the British fleet. It is obvious that so long as enemy-vessels are allowed by a belligerent Power freely to enter or to come out of enemy-ports, the condition of things, which alone authorises a belligerent to interfere at all with the trade of neutrals does not exist, namely, the necessity of interdicting all communication by way of trade with the ports in question, in order to compel the enemy to submission. In arriving at the conclusion, that the British Orders in Council issued on this occasion, granting for six weeks to enemy vessels free access to their ports of destination, forbade the establishment of any blockade of the Baltic ports during such time by British

[96] The Franciska, Spinks's Eccl. and Adm. Reports, II. p. 135.

vessels to the prejudice of neutral commerce, the Lords of Appeal made a distinction which is worthy of notice: "No doubt," they said, "ships of one belligerent at the outbreak of war, found in the ports of another, into which they have entered for peaceful purposes, with the expectation of the continuance of peace, form an exceptional class which has a strong claim to an indulgent exercise of the right of capture; and an express permission to such ships to enter their port of destination, though blockaded, might perhaps not affect the validity of the blockade. It might fall within the class of cases alluded to by the learned Judge of the Court below, of license granted in particular cases upon special grounds. Such a case is very distinguishable from one where a belligerent, with a view to the interests of his own commerce, permits enemies' ships to bring him cargoes from their own ports, though he at the same time insists on a blockade of such ports against neutrals[97]."

[97] 10 Moore, P. C. p. 56.

CHAPTER VII.

CONTRABAND OF WAR.

Origin of the term Contraband—Application of the term to international trade—Treaty of Southampton of 1625—First Proclamation of King Charles I.—Second Proclamation of 1626—Earliest Catalogue *in extenso*—Zouch on Fetial Law—Queen Elizabeth and the Envoy from Poland—Queen Elizabeth and the Hanse Towns—Albericus Gentilis—Klüber—Heffter—Early Conventions in restraint of neutral trade with an enemy's country—Placaarts of the States General in the sixteenth century—Practice of European Powers at the end of the sixteenth century—Practice of the seventeenth century—Doctrine of Grotius as to Contraband of war—Treaty of Westminster of 1654—Treaty of Paris of 1655—Treaty of the Pyrenees of 1659—Treaty of Whitehall of 1661—Treaties of Breda and Madrid of 1677—Treaty of St. Germain-en-Laye of 1677—Treaty of Whitehall of 1689—Opinion of Sir Leoline Jenkins—Treaty of Utrecht of 1713—British Treaty-engagements—Concurrence of European Nations as to certain articles—Bynkershoek's view—Vattel—Italian and Spanish Jurists—French Jurists—Practice of British Prize Courts—Practical difficulty of specifying articles conditionally contraband—General doctrine of British Prize Tribunals—British Treaty with United States of 1796—Treaty Right of Preemption—Treaty of Westminster of 1656—Treaty of Whitehall of 1661—Treaty of Orebro of 1812—Treaty of Upsal 1654—Equity as to conditional contraband—Ships under circumstances contraband of war—Transport, not sale, of merchandise penal by the Law of Nations—Treaty-engagements between Prussia and the United States of America—Belligerents may not interfere with trade within the jurisdiction of a neutral State.

§ 121. *Contraband* is a term of positive law, and in its primary sense denotes something prohibited

Origin of the term Contraband.

by *Ban*, or Edict. The word is probably of Italian origin, (*Contrabbando*[1],) as the earliest document in which any trace of it is extant is an Italian Charter of A. D. 1445[2], in which the Latin equivalent *Contrabannum* is used in relation to a trade prohibited by the Sovereign Power of a State to its citizens in time of peace. The term is not employed by Grotius, the first edition of whose work[3], De Jure Belli et Pacis, was published in 1625; but it occurs in a Treaty of offensive and defensive alliance concluded at Southampton in that year, (17 Sept. 1625,) between King Charles I of England and the United Provinces of the Low Countries; from the language of which it would seem that the term *Contraband* had at that time a recognised acceptation amongst Nations, in reference to a branch of maritime trade, which was prohibited to merchants in time of war. "Toutes marchandises de contrebande, comme sont munitions de bouche, et de guerre, navires, armes, voiles, cordages, or, argent, cuivre, fer, plomb, et semblables, de quelque part qu'on les voudra porter en Espagne, et aux autres pays de l'obéissance du dit Roy d'Espagne et de ses adhérens, seront de bonne prise avec les navires et hommes qu'ils porteront." Art. XX.[4]

Application of the term to international trade.

§ 122. It would be a difficult task in the present day to determine with precision the circumstances under which the word *Contraband*, which was ori-

[1] The Spanish phrase is, 'Mercaderias de contravando.' D'Abreu, c. 11.

[2] Item quod non permittant committentes *contrabannum* dicti salis, vel aliarum rerum in dictis locis tuto et secure permanere. Ducange, Gloss. vox *Contrabannum*.

[3] The word *Contraband* does not occur in the Guidon de la Mer, the author of which is unknown; but the compilation of which work M. Pardessus has, with great probability, assigned to the latter part of the sixteenth century.

[4] Dumont, Traités, Tom. V. Part II. p. 480.

ginally a term of municipal law, came to be applied to a trade in certain articles carried on by the subjects of a Neutral Power with the ports of a belligerent State; and whether the use of the term in the Treaty of Southampton[5] was suggested by the fact, that belligerent Powers had been long accustomed at the outset of war to forbid, by Declarations[6] formally communicated to neutral Powers, all trade with the ports of their enemies in certain articles of merchandise; or that Neutral Powers were beginning, in pursuance of treaty-engagements to prohibit their own subjects by public Proclamation from transporting over sea certain articles of merchandise in time of war to the ports of belligerent States. The more probable opinion would seem to be, that the various Treaties, which were concluded amongst the maritime Powers of Europe on the subject of Contraband of War in the first half of the seventeenth century, were entered into with the object of regulating an acknowledged Right on the part of every belligerent State to interfere with the trade of neutral subjects to the enemy's ports, and of restraining the exercise of that Right within just limits; and that the engagements on the part of neutral States not to permit their Subjects to transport over sea certain articles of merchandise to the enemy's country were auxiliary to that object. That the term *Contraband*, as employed in the Treaty of Southampton, was intended to denote articles of merchandise forbidden under the Proclamation of a belligerent Power to be carried to an enemy's ports, may fairly be inferred from

Treaty of Southampton of 1628.

[5] This seems to be the earliest treaty in which the phrase 'Marchandises de contrebande' occurs.

[6] Instances of such declarations on the part of England will be found in Camden, anno 1591 and 1597. Grotius enumerates various instances of similar declarations on the part of other Powers in a note appended to Lib. III. c. 1. § 5. 1. De Jure Belli et Pacis.

the fact, that a Proclamation was issued by King Charles I. on 31 Dec. 1625, shortly after the signature of that Treaty, which in accordance with its provisions purported "to declare that all ships carrying corn or other victuals, or any munition of war, to or for the King of Spain or any of his subjects, shall and ought to be esteemed as lawful prize."

First Proclamation of King Charles I.

§ 123. It was recited in this Proclamation "that whilst the King of Spain continued in terms and courses of hostility, it was neither agreeable with the rules of policy or Law of Nations to permit the said King of Spain or his subjects to be furnished or supplied with corn, victuals, arms, or provisions for his shipping, navy, or army, if the same can be prevented. The King accordingly, with the advice of his Privy Council, formally notified to all manner of persons of all conditions, that shall send or carry into Spain, Portugal, Burgundy, or any other the said King of Spain's countries, or dominions, any manner of grain or other victuals, or any manner of provisions to serve to build, furnish, or arm, any ships of war, or any kind of munition for the war, or materials for the same, being not of the nature of mere merchandise, that, as it is lawful for his Majesty, being a Monarch and Prince Sovereign, and as other kings in like cases have already used to do, he will not only authorise his own admirals and captains of his own ships of war, serving on the seas, but will also allow and approve all other his subjects to arm their ships at their will, and with them to impeach and arrest all ships that shall sail, either out of the East ports, or out of the Low Countries, or from any other ports, with intention to pass Spain, Portugal, Burgundy, or any other the King of Spain's countries or dominions, or to any the King of Spain's ships, being on the seas, having

on board any such grain, victuals, or provisions of war, or furniture for shipping, or materials for the same; and the same to bring into the next good port, there to be ordered as goods duly forfeited for the benefit of his Majesty, where his Majesty's ships shall arrest the same, and to the benefit of such others, as being not in his Majesty's wages shall by their travel and adventure have stayed and arrested such ships and goods prohibited[7]."

Second Proclamation of 1626.

In the following year (4 March 1626) a second Proclamation[8] of a more special character was published by the same Monarch, entitled "a Proclamation to prevent the furnishing the King of Spain and his subjects with provisions for shipping, or munition for the war, and with Victuals." The purport of the previous proclamation having been recited in the preamble, the second proclamation goes on to declare that "his Majesty intending to remove all pretext of ignorance or other exception which may be taken against the proceedings of his judges and officers, with any the subjects of his friends, confederates, or allies, who shall hereafter offend in the premises, has thought fit, by these presents to make further declaration, as well of the species or kinds of the things so prohibited as of the penalties to be suffered by the parties delinquent in supplying the enemies with the same prohibited things. Concerning therefore those kinds wherewith his Majesty may not suffer his said enemies to be furnished, his Majesty does by these presents publish and notify, that he holdeth these things following to be of that quality and condition, *videlicet*, 'ordinance, armes of

[7] It appears under this proclamation that private ships equally with public ships of war were authorised to capture neutral vessels carrying merchandise, which was contraband of war.

[8] Rymer, Fœdera, Tom. XVIII. p. 856. Robinson's Collectanea Maritima, p. 63.

all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kindes, hempe, saile, canvas, danuce pouldavis, cables, anchors, mastes, rafters, boate oars, balcks, capraves, deale board, clap board, pipe staves, and vessels, and vessel staffe, pitch, tarr, rosen, okam, corne, graine, and victualls of all sortes, all provisions of shipping, and all munition of warr, or of provision's for the same, according to former declarations and acts of State, made in this behalfe in the time of Queen Elizabeth, of famous memorie.'" This is probably the earliest catalogue *in extenso* of articles of merchandise deemed contraband of war[9], for it does not clearly appear that the articles prohibited had been specifically set forth in the former declarations of Queen Elizabeth. On the contrary, it seems probable, from the writings of Dr. Zouch[10] and Albericus Gentilis[11], that the judgments of the

Earliest Catalogue *in extenso.*

[9] The earlier treaties of 1604, 1614, 1615, which are to be found in Dumont's Traités, Tom. V. do not specify in detail the articles of merchandise prohibited to be carried to enemy's ports.

[10] Dr. Zouch, in his Treatise on Fetial Law, first published in 1634, refers to several disputes on the subject of contraband of war between Queen Elizabeth and Foreign Princes, and amongst others, to the dispute with Spain as to tobacco being an article of provision, and consequently contraband of war. The Spanish Prize Courts declared tobacco to be an article of provision, and accordingly confiscated a British ship which was carrying a cargo of tobacco to the Low Countries; whereupon Queen Elizabeth granted Letters of Reprisal to the owners of the ship and cargo against the commerce of Spain. Pars II. § 8.

[11] Albericus Gentilis, in his Advocationes Hispanicæ, c. 20, discusses the case of a British ship laden with a general cargo and some gunpowder sailing to Constantinople, under a license from Queen Elizabeth, which had been captured by the Knights of Malta, as carrying munitions of war to an infidel nation contrary to the prohibition of the Canon Law. Gentilis points out that infidels, as such, could not be regarded as enemies in the sense in which it was forbidden by the Law of Nations to carry munitions of war to an enemy, and observes that the Canon Law did not furnish any rule for such matters in England. "Etiam licita ad Turcos fieri per placita Reginæ Elizabethæ. Has patrias leges norunt Angli, quas sequuntur: alias et canonicas illas

Admiralty Courts in the reign of that Queen had first contributed to give precision to the catalogue of *bona prohibita*. What was the penalty of carrying such prohibited goods is thus set forth in the sequel of King Charles's second Proclamation: "And therefore, if any person whatsoever, after three months from the publication of these presents, shall by any of his Majesty's own ships, or the ships of any of his subjects authorised to that effect, be taken sailing towards the places aforesaid, having on board any of the things aforesaid, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods so taken for lawful prize, and cause them to be ordered as duly forfeited, whereby as his Majesty doth put in practice no innovation, since the same course has been held, and the same penalties have been heretofore inflicted by other States and Princes, upon the like occasions, and avowed and maintained by public writings and apologies so now his Majesty is in a manner enforced thereto by proclamations set forth by the King of Spain and the Archduchess, in which the same and greater severity is professed against those, that shall carry or have carried without limitation the like commodities into these his Majesty's dominions[12]." It would appear from both the above proclamations, that the usage of Princes was relied upon in evidence of the Right of a belligerent to impose penalties on neutral merchants for giving aid to an enemy by carrying munitions of war to his ships or his dominions. It will be important therefore to consider what that usage of Princes was at the commencement of the seventeenth century.

non norunt, quæ exulant etiam ex Anglia."

[12] Rymer, Fœdera, Tom. XVIII. p. 856. Robinson's Collectanea Maritima, p. 63.

Zouch on Fetial Law.

§ 124. Dr. Zouch, in his treatise of Fetial Law[13], published in the earlier part of the seventeenth century, in discussing the question whether it is lawful to intercept the goods of friends on their way to an enemy, "An res amicorum ad hostes transeuntes intercipere liceat?" gives the substance of an interview, which is also narrated by Camden[14], between the Ambassador of Sigismund King of Poland, and Queen Elizabeth of England, when the former complained with great vehemence, on behalf of the King his master, of a violation of the Law of Nations, by her Majesty prohibiting Polish merchants from carrying their goods to Spanish ports, and thereupon demanded both the restitution of such goods as had been captured by British cruisers, and for the future perfect freedom of navigation to Spain. Queen Elizabeth having first administered to the Ambassador the well-known rebuke, that she had been greatly deceived, for that she had expected an Ambassador and found a Herald[15], went on to say, "As regards the Law of Nations, you ought to know, that when war has broken out between kings, it is lawful for either party to intercept any aid or supplies which are sent to the other, and to provide that no harm shall accrue therefrom to himself. This, we tell you, is according to the Law of Nature and of Nations, and has not been done by us alone, but by the kings of Poland and of Sweden in their wars against the Muscovites[16]."

Queen Elizabeth and the Polish Envoy.

[13] Juris et Judicii Fetialis sive juris inter Gentes et quæstionum de eodem explicatio. Oxon. 1634.

[14] Camdeni Hist. Eliz. anno 1597.

[15] Quam decepta fui! Legatum expectavi, Heraldum inveni. Zouch, p. 128.

[16] Quod tu jus gentium prætendis, scire debes, exorto inter reges bello, licere uni parti auxilia vel subsidia ad alteram partem missa intercipere et providere, ne damni quicquam inde sibi accidat. Hoc nos dicimus Naturæ et Gentium juri esse consentaneum et non a nobis solum, sed etiam a Poloniæ Sueciæque regibus factitatum in bellis quæ cum Muscovitis gesserunt. P. 128.

It appears from the annals of the reign of this Queen that she justified on several occasions the capture of the ships and merchandise of neutrals on their way to an enemy's country, on the ground that it was allowable by the laws of war to capture such ships and their cargoes. One of the most remarkable of these instances arose upon the capture of a fleet of sixty vessels belonging to the Hanse Towns (anno 1589), which were carrying corn and naval munitions to Spain. The Hanse Confederation alleged that the capture of their ships and cargoes was in violation of their ancient privileges. Queen Elizabeth in reply observed, that the corn on board their vessels was justly confiscated, for that she had forewarned them not to carry any supplies to one, who had declared himself to be so notorious an enemy of her kingdom. Besides, in the diplomas of privileges granted to the Hanse merchants by her predecessors, it was specially provided that they should not carry merchandise to the notorious enemies of her kingdom. That they had been previously warned by Royal Letters under her hand and by the Alderman of the Hanse Confederation, resident in London, not to carry corn or other military or naval munitions to Spain or Portugal, and that by disregarding the prohibition and the warning, they were the authors of their own loss. That unless the Hanse Confederation had supplied the King of Spain with victuals and other munitions of war, he could not have kept up hostilities and prevented peace being restored to Europe, and that by the supplies furnished by them the King of Spain was rendered more able to carry on the war against England and Wales, and to attempt to subjugate both countries and reduce them to a province of Spain. Nor was the proceeding on the part of the English Crown by any means novel,

Queen Elizabeth and the Hanse Towns.

since there had been numerous instances in which the merchants of the Hanse League, as well as the merchants of other countries, had been prohibited in like manner from trading with the enemy by various European powers, and there were precedents of the Hanse League, when engaged in war, imposing like prohibitions upon the subjects of neutral states[17].

French Ordinance of 1543.

It would also appear from the language of a very early French Ordinance[18] (A.D. 1543), that in the sixteenth century the French King claimed to exercise the right of preventing munitions of war being transported to the enemy's country in the ships of neutrals, irrespective of any treaty obligation upon the part of such neutrals to refrain from such commerce, for he expressly authorises and permits his subjects to capture such munitions of war, and bring them into his ports, there to be adjudged prize to the captors. "Mais pourront nozdits alliez et confederez faire leur traficque par mer dedons navires qui soient de leur obeissance et sujection, et par leurs gens et subjects, sans y accueillir nos ennemis et adversaires; lesquels biens et marchandises ainsi chargées ils pourront mener et conduire où bon leur semblera, pourveu que ce ne soyent munitions de guerre dont ils vousissent fortifier nozdits ennemis; auquel cas nous avons permis et permettons à nos dits subjects les prendre et amener à nos ports et havres, et les

[17] This Reply is set forth *in extenso* in a letter of 2 July 1599, addressed by Mr. Secretary Cecil to Sir Henry Nevile, the English Ambassador at Paris, which is found in Winwood's Memorials, vol. i. p. 57. It is worthy of perusal as containing a full exposition of the English view of the law in such matters, and its contents show how much its purport has been misrepresented by many writers, who have spoken of it as an attempt to reduce Spain by famine. Cf. Causes Célébres du Droit des Gens, par le Baron Charles de Martens, II. p. 334.

[18] Lebeau, Code des Prises, Tom. I. p. 17.

dites munitions retenir selon l'estimation raisonnable, qui en sera faite par nostre dit admiral ou son lieutenant."

Usage of Europe in the sixteenth century.

§ 125. It seems to have been the established usage of Europe in the middle of the sixteenth century for belligerent Powers to prohibit all merchants from carrying munitions of war to the ships or dominions of their enemies, and to confiscate all vessels laden with such munitions, if taken on the High Seas on their way to the enemy's country. Albericus Gentilis, in discussing the lawfulness of the capture of an English ship, taken by Sardinian and Maltese cruisers on a voyage to Constantinople with a general cargo including some barrels of gunpowder, and which was in judgment before a Spanish Court of Admiralty, observes, that "the capture was justifiable by the Civil Law, by the Canon Law, by the Law of Nations, and by Conventions between England and Spain[19]." Thus the Civil Law had made it a capital offence for any one to supply Barbarians with oil, wine, or any munition of war[20]. The Canon Law had similarly forbidden all Christians to supply any munitions of war to the Saracens[21]. The practice of England on the other hand, in regard to the merchants of the Hanse Towns, in not permitting them to carry provisions to Spain, was evidence of the Law of Nations[22], whilst the Treaty of 1604 concluded between Philip III of Spain, the Archduke Albert and his wife Isabella, and James I of England, bound each of the contracting parties not to supply or consent

Albericus Gentilis.

[19] Hispanicæ Advocationes, L. I. c. 20.

[20] Cod. L. IV. Tit. XLI. Quæ res exportari non debeant, c. 1 and 2.

[21] Concil. Lateran. III. anno 1179. (Alexander III.) Decretal. Greg. IX. L. V. Tit. VI. c. 12 anno 1190. Concil. Lateran. IV. anno 1215. (Innocent III.) Extravag. Joann. XXII. Tit. VIII. (anno 1316.) Bulla Cœnæ Domini, c. 7.

[22] Albericus Gentilis, de Jure Belli, c. 21.

to its subjects supplying to the enemies of the others any soldiers, provisions, money, instruments or munitions of war, or warlike aid of any kind whatsoever[23]. Most writers refer the origin of belligerent prohibitions against the trade of neutrals with the enemy to the Confederation of the Hanse Towns; and after the subject of Contraband of War came to be formally regulated by international compacts, the Hanse Towns were amongst the foremost of the Maritime Powers to enter into Conventions with other Powers.

§ 126. Certain writers[24] have contended that the whole law of Contraband of War rests upon Conventions, and that there is no Common Law of Nations in such matters. "In the absence of treaties," says Klüber, "the Natural Right of Nations, which establishes complete liberty of commerce, is in force, and all merchandise ought to be presumed free." Heffter with justice combats this view as being at variance with historical truth, and observes that the declarations of the Armed Confederations of the Baltic Powers in 1782, and in 1801, contain nothing in support of this theory: on the contrary those Powers were not opposed to the *principle* of "contraband of war," but only to the arbitrary application of it; and they advocated a common agreement amongst Nations as

Klüber.

Heffter.

[23] Item quod neutra partium præstabit nec præstari per aliquos suos vassallos subditos incolasve consentiet auxilium, favorem, vel consilium directe nec per indirectum, tam per terram quam per mare et aquas dulces, nec subministrabit nec subministrari consentiet per dictos vassallos, incolasve et subditos Regnorum suorum, milites, commeatus, pecunias, instrumenta bellica, munitiones, vel aliquodvis aliud auxilium ad bellum confovendum hostibus, inimicis, ac Rebellibus alterius partis, cujuscunque generis sint, tam invadentibus Regna, patrias ac dominia alterius, quam se subtrahentibus ab obedientia et dominio alterius. Dumont, Traités, Tom. V. Pars II. p. 32.

[24] Lebeau, Code des Prises, Tom. I. p. 15. Jouffroy, Droit Maritime, p. 3. Klüber, Droit des Gens, § 288.

to *details*. If the facts of history may be appealed to in elucidation of the controversy, it would appear that the Nations of Europe claimed in the sixteenth century to capture on the High Seas *jure belli* the vessels and goods of the subjects of neutral Powers, which were on their way to an enemy's ports, on one or other of these grounds[25], either that the trade was in contravention of some treaty-engagement with the neutral Power, whereby it had bound itself not to give aid or to consent to its subjects giving aid to the enemy of the belligerent, or that the belligerent had prohibited the trade by an express notice to the neutral, that under the particular circumstances of the war certain articles could not be considered in the nature of mere merchandise, being things required by the enemy to enable him to maintain hostilities. It had been usual from a very early period to introduce a clause into treaties, whereby either of the contracting parties bound itself not to give aid to the enemies of the other. Thus in one of the earliest Treaties between England and France (A.D. 1303), it was provided: "Item. Accordé est que l'un ne receptera ne soustendra ne confortera, ne sera confort, ne ayde aus ennemis de l'autre ; ne ne souffera qu'ils aient confort, secours ne ayde, soit de gent d'armes, ou de vitailles ou d'autres choses queles qu'eles soient, de ses terres ne de son poiar[26]." But even in such cases discussions sometimes arose as to the meaning of the word *ayde*, which was used in the treaties, whether or not it extended to any goods which were merchandise of usual traffic to other countries. Thus in the discussions between Sir Ralph Sadler,

Early Conventions in restraint of neutral trade.

[25] Pactis enim Principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Bynkershoek, Quæst. Jur. Publ. L. I. c. 10.

[26] Rymer, Fœdera, Tom. II. p. 927.

the Envoy of King Henry VIII, and the Government of Scotland (A. D. 1543), respecting the detention of some Scotch vessels by the English Government, it was contended on behalf of the English Crown, that as the vessels were carrying victuals to French ports, it was a breach of treaty, for that the Scotch were bound not to minister any kind of aid to the enemies of England. To which the Scotch Government made answer, that there was no other cargo on board those said vessels than fish, which was a common article of traffic between the two countries in time of peace, and that they could not perceive by the treaties, that merchants being subjects of either realm might not use their accustomed traffic with such merchandise, as they have been in use to transport to other countries. The English Envoy replied, that "fish could not but be deemed to be victuals, and being laden in the said ships to be transported to France, which was in open hostility with England, was a certain kind of aid ministered to the enemies of England, and therefore a lawful and just cause to stay the said ships[27]." Thus much for Treaty-Engagements in restraint of the freedom of neutral trade in time of war. On the other hand, Albericus Gentilis[28] lays great stress on the fact, that Queen Elizabeth had notified to the Hanse Confederation not to carry provisions into Spain, before she captured their vessels; and the Protestants are represented by De Thou to have replied to the complaints of the Portuguese, by reason of twenty-five Portuguese vessels having been captured, bound with cargoes of corn to Spanish ports, "Jure belli tales spoliari naves, quippe rem edictis et constitutionibus regiis pro-

[27] Sir Ralph Sadler's Letters and Negotiations in Scotland, p. 381.

[28] Hispanicæ Advocationes, L. I. c. 20. p. 92.

hibitam esse[29]." The Right of a belligerent Power to prohibit by notice or proclamation the trade of neutrals with the enemy's country was so absolutely maintained in practice, that we find the States General of the Low Provinces, during their war with Spain in 1599, issuing a Placaart, which they made known to all Kings and Nations, whereby they forbade all merchants to carry to the Spaniards provisions or any other goods whatsoever, under the penalty of being treated as enemies[30]. The historian informs us that King Henry IV of France directed his subjects to submit to this Placaart for six months, and that the other Powers of Europe passed it over in silence. But it would appear from a letter of Sir Henry Nevile to Mr. Secretary Cecil, that the English Government held this Placaart of the States General to be "an effect of great necessity, which had no law[31]."

Placaarts of the States General in sixteenth century.

§ 127. The general practice of Belligerents, as gathered from the Placaarts and Ordinances issued by various Powers in the latter part of the sixteenth and in the early part of the seventeenth century, shows that Belligerent States held themselves entitled of Right, if they considered it to be necessary to secure a successful issue to the war in which they were engaged, to interdict neutrals from furnishing any supplies to their enemy. This practice had the support of Publicists, who held that the Right of the Belligerent in such a case was a Natural Right of a public character, which must prevail over the pri-

Practice of European Powers at the end of sixteenth century.

[29] Loccenius, De Jur. Maritimo, L. I. c. 9. Thuani Historia, L. 64.

[30] Grotius, Hist. de Rebus Belgicis, L. VIII. Per edictum vetant populos quoscunque alios commeatus resve alias in Hispaniam ferre: si qui secus fecerint, ut hostibus faventes, vice hostium futuros.

[31] This Letter bears date, Paris, 15 May 1599, O. S., and is found in Winwood's Memorials, Vol. I. p. 23.

vate right of a merchant to carry on his trade. "Jus commerciorum æquum est," writes Albericus Gentilis, "sed hoc æquius tuendæ salutis; est illud gentium jus, hoc naturæ est; est illud privatorum, hoc est regnorum[32]." These views of the Publicists of the seventeenth century have been commented on by Azuni and Lampredi. The former says, "Publicists lay it down as a principle, that a Nation has a complete and perfect right to diminish indefinitely the forces of its enemy, to frustrate all the means which its enemy can employ to preserve or augment his forces, and even to prevent any other Nation from carrying on a commerce with its Enemy, which may increase his resources or his means of attack and defence[33]." Lampredi writes thus: "It is permitted to friendly and neutral Nations to continue their trade in its full extent: the only restriction which war imposes upon their liberty in this respect is, that they observe strict impartiality between the belligerents; nevertheless a belligerent Nation may prevent the Commerce of Neutrals with the Enemy, from the moment that it considers it necessary for its own safety to do so[34]." This practice may be said to have culminated in the Placaart of the States General of 1599, already referred to, by which they prohibited neutral merchants from carrying any goods whatever to Spanish ports; in other words, by which they placed all the ports of the King of Spain under an Interdict. On the other hand, if a neutral Nation did not acquiesce in the view of necessity, under which the Belligerent claimed a right to act in capturing the vessels and goods of the subjects of the neutral Nation, it was open to the latter to make

[32] De Jure Belli, Comment. I.

[33] Droit Maritime de l'Europe, T. II. c. 2. Art. 2. § 6.

[34] Commerce des Neutres, c. 1. § 4.

Reprisals. Thus during the war between the States General and Spain, a Spanish cruiser captured a British vessel, which was bound to a Dutch port with a cargo of tobacco. The Spanish captors on this occasion maintained successfully before the Spanish Prize Court, that tobacco was rightly to be considered amongst victuals, inasmuch as by the use of tobacco the consumption of victuals might be prolonged. The English claimants on the other hand contended in vain that tobacco was not a nutritive plant, and that it had not been interdicted by the express words of the Spanish Proclamation. The judgment of the Prize Court was in favour of the captors. The English owner therefore made complaint to the King of England, who upon the advice of his Council, granted to the owner letters of Reprisal against the subjects of the King of Spain, in order that he might make good his loss[35].

Practice of the seventeenth century.

§ 128. The application of the word Contraband for the first time in the Treaty of Southampton (1625) to articles which neutrals might not rightfully carry to an enemy's country in time of war, seems to be confirmatory of the fact, that the Right of a Belligerent to interdict by formal notice the trade of a Neutral in certain articles with the Enemy's country was fully recognised in the early part of the seventeenth century. King Charles I thought it right, in pursuance of this Treaty, to issue a formal Catalogue *in extenso* of the articles which he intended not to allow to be carried to the enemies of England, for England had previously maintained against Spain,

[35] Processes in the Court of the Admiralty of England, cited in Zouch, de Judicio inter Gentes, § 8. Part II. p. 132. Tobacco is specified amongst the articles, which were not to be regarded as contraband of war, in the treaty between Charles II of England and the States General, (1 Dec. 1674). Dumont, VII. Pars. I. p. 283.

that *parity of reason* was not sufficient to render merchandise confiscable, unless it had been interdicted by express words. During the period which intervened between the conclusion of the Treaty of Southampton in 1625, and the Treaty of the Pyrenees in 1650, a great change seems to have come over the opinions of Statesmen, or a great modification to have taken place in the policy of the European Powers, in regard to the trade of Neutrals in time of war. The subject is too obscure to admit of a complete elucidation. The probability is, that both suppositions are correct, and that whilst the writings of Grotius had contributed to mould the opinions of Statesmen into a more reasonable form, the necessities of international commerce had compelled the European Powers to modify their policy.

Doctrine of Grotius as to Contraband of war.

§ 129. "There have been formerly," says Grotius[36], "and still are great disputes as to what may lawfully be done to those who are not our enemies, nor are willing to be thought so, and yet furnish our enemies with supplies. This is a point which has been sharply contested, both in ancient and in modern times, some maintaining the extreme right of war, others the liberty of commerce. In the first place, we must distinguish between the things themselves; for there are some things which are of use only in war, as arms; others which are of no use in war, but serve only for pleasure; others which are useful both in war and in peace, as money, provisions, ships and their appurtenances. Concerning the first kind, it is true, what was said by Amalasuntha to Justinian, that they are on the side of the enemy, who supply him with things necessary for the war. As to the second class of things, no complaint can be raised.

[36] De Jure Belli et Pacis, L. III. c. 1. § 5.

With regard to the third class, which are objects of equivocal use, the circumstances of the war must be considered; for if I cannot protect myself unless I intercept what is sent, necessity will give me a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. But if the supplying of the articles will impede the execution of my design, and the party who transports them might have known this fact; as for instance, if I am besieging a town, or blockading a port, and a surrender or a peace is daily expected: he will be liable to me for damages, and his property may be taken to satisfy the damages. If he has not done the damage, but is only attempting to do it, his property may be detained until he give security for the future; but if the injustice of my enemy be very clear, and the supplies conveyed to him support him in his unjust war, then shall the party who conveys them to my enemy be not only liable to repair my loss, but he may be treated as a criminal, as one who is rescuing a notorious offender from impending judgment; and for this reason it will be lawful for me to deal with him according to his offence, and for the purpose of punishment I may deprive him of his merchandise."

§ 130. The Peace of Westphalia (A.D. 1648) having secured the independence of the United Provinces from all further dispute upon the part of Spain, and the Navigation Act, which had been passed by the English Parliament under the Commonwealth in 1651, being justly regarded by the Dutch as intended to secure to British shipping a portion of the carrying trade hitherto enjoyed exclusively by Holland, we find that after these events, a more lenient policy, in reference to the trade of Neutrals in time of war, began to find favour with the States General, owing,

as is most probable, to the counsels of the Grand Pensionary John de Witt. Thus the States General had concluded treaties with Sweden and with the Hanse Towns in 1613, under which provisions were to be regarded as prohibited merchandise during war. They had also concluded in 1625 a treaty with England, in which provisions were enumerated amongst the articles described expressly as Contraband of War. But on 6 April 1654 a treaty[37] was concluded at Westminster between the United Provinces and the Commonwealth of England, under the seventh article of which it was agreed that "neither party should supply to the enemies of the other any soldiers, arms, munitions of war, or other prohibited goods, or any money, provisions, or victuals, by sea or by land; and that all ships, arms, munitions of war, and prohibited goods, also money and provisions to whomsoever belonging, which shall be supplied contrary to the sense of this article, shall be confiscated: and that all parties contravening this article, shall be adjudged enemies of both countries, and be punished as such in the country where they may be captured: with regard, however, to the specification of what shall be considered as prohibited or Contraband goods, Commissioners shall determine the matter at a convenient time, without prejudice however to the provisions of the article itself." The first observation which suggests itself on reading the above article is, that money and provisions are not enumerated amongst goods considered as prohibited or Contraband, although it is agreed that neither party shall supply them to the enemies of the other. This departure from precedent was most probably the result of the influence of the Grand Pensionary De Witt, as he

Treaty of Westminster of 1654.

[37] Dumont, Traités, Tom. VI. Part II. p. 74.

had pronounced his opinion in the early part of this year[38], that Neutrals were not prohibited by the Common Law of Nations from carrying corn to a belligerent country. De Witt was himself an advocate of the doctrine of Free Ships Free Goods, and was at this time negotiating with France to obtain several modifications of the severity of her Prize Code[39]. France, on the other hand, as appears from Sir Henry Nevile's negotiations[40] in 1599, had been for some time unwilling to consider corn as merchandise absolutely prohibited in time of war to be imported into the ports of a belligerent by neutral merchants. It is not surprising therefore that France should be found taking the lead amongst the European Powers in adopting a more lenient rule than that, which the Dutch and British negotiators had agreed upon in the Treaty of Southampton (A.D. 1625), when they declared provisions generally under the title of "munitions de bouche" to be contraband. We find accordingly a treaty of commerce concluded between Louis XIV and the Hanse Towns (Paris, 10 May 1655), in which a catalogue of Contraband of War was set forth, from which provisions were omitted. This catalogue deserves notice, as upon its model, with the omission of cordage and sail-cloth, almost all the subsequent treaties on the subject of Contraband of War in the seventeenth century were framed:—

Treaty of Paris of 1655.

ART. XI. Lesquelles marchandises de contrebande sont entendues être munitions de guerre, armes à feu; scavoir, canons, mousquets, mortiers, bombes, pétards, grenades,

[38] A letter to that effect, dated 14 Jan. 1654, is cited in a note to Vattel. Droit des Gens, L. III. c. 6. § 112.

[39] Lettres et Négotiations de Jean de Witt, Tom. I. p. 108.

[40] Winwood's Memorials, Vol. I. p. 23.

saucisses, cercle, affûts, fourchettes, bandoulières, poudre, mesche, salpestre et toutes autres sortes d'armes, comme picques, espées, morions, casques, cuirasses, hallebardes, javelots, et autres armes servans à la guerre, ensemble des chevaux, des cordages, et des toiles noyales, qui ne puissent servir qu'à faire voiles; pourront néammoins porter des bleds et grains de toutes sortes, legumes et autres choses servans à la vie, si ce n'est que les villes et places où ils les transporteront fussent attaquées par sa Majesté, et que volontairement ils les y transportassent sans y être forcéz par les ennemis de sa Majesté et se servant par violence de leurs vaisseaux trouvez dedans leurs Portes, ou ailleurs; auquel cas pourront les Commandans des Vaisseaux de sa Majesté retenir les dits grains et autres choses servans à la vie, en payant leur juste valeur, suivant l'estimation qui en sera faite, sinon et à faute d'estimation et de payement en deniers comptans, les sujets desdites Villes Anséatiques pourront se retirer librement avec leurs vaisseaux et marchandises, si ce n'est qu'elles fussent de la qualité de celles spécifiées cy-dessus pour être de contrebande[41].

Treaty of the Pyrenees of 1659.

§ 131. France having thus secured the consent of one of the Great Maritime Powers to the mitigation of the more severe rule, which made provisions Contraband of War, came to an agreement with Spain on the same subject under the Treaty of the Pyrenees, A.D. 1659, which is most frequently referred to by Publicists as furnishing the rule for determining what is Contraband of War by the common consent of the Nations of Europe. It may be justly said, that there is no dispute amongst the Nations of Europe respecting the merchandise enumerated in the twelfth article of this treaty being all unlawful merchandise for neutral merchants to carry to an enemy's country:—

Art. XII. Sub hujusmodi mercibus prohibitis, sive de Contre-bande, comprehensæ solummodo intelliguntur omnis generis machinæ ignivomæ et alia huc pertinentia instru-

[41] Dumont, Traités, Tom. VI. Pt. II. p. 103.

menta; verbi gratia, tormenta ænea majora, sclopeta, mortaria, exostræ, globi incendiarii, granatæ, saucissæ, coronæ et serta ignea, tormentorum bellicorum fulcimina lignea, sclopetariorum furcillæ, coramina ad pulveris ac plumbi mensuras reponendas apta, pulvis pyrus, funes incendiarii, sal nitrum, glandes, longiores hastæ, gladii, cassides, galeæ, loricæ, bipennes, sarissæ, equi, ephippia, bulgæ, quibus sclophi inseruntur, baltei, aliaque hujus farinæ ad bellum spectantia.

The next following article of the treaty, which excludes provisions from the list of Contraband of War, may be considered to have the consent of all the Nations of Europe, so far indeed as it recognises the Right of a belligerent Power to confiscate the merchandise enumerated, if it is being carried to a blockaded port :—

ART. XIII. Sub ejusmodi mercibus prohibitis sive *de Contrebande* minime comprehenduntur triticum, frumentum et alia grana, legumina, olea, vina, sal aut generaliter alia ulla; quæ aliæ omnes res vendibiles atque merces, quæ in præcedenti articulo expressæ non sunt, libertate fruuntur; eritque illorum transportatio, etiam in ipsa loca Coronæ Hispanicæ inimica, excepta Lusitania, prout dictum fuit, et urbibus locisque obsidione cinctis, circumclusis, aut invasis, permissa[42].

[42] The Latin version of this Treaty will be found in Schmauss, Corpus Jur. Gent. Academicum, p. 683; the French version is in Dumont, Traités, Tom. VI. Pt. II. p. 266 :—

ART. XII. En ce genre de marchandises de contrebande s'entend seulement estre comprises toutes sortes d'Armes à feu, et autres assortissemens d'icelles; comme canons, mousquets, mortiers, pétards, bombs, grenades, saucisses, cercles poissez, affusts, fourchettes, bandolières, poudres, mesches, salpestre, balles, picques, espées, morions, casques, cuirasses, hallebardes, javelines, chevaux, selles de cheval, fourreaux de pistolets, baudriers, et autres assortissemens servans à l'usage de la Guerre.

ART. XIII. Ne seront compris en ce genre de Marchandises de Contrebande, les fromens, bleds, et autres grains, legumes, huiles, vin, sel, ny généralement tout ce qui appartient à la nourriture et sustentation de la vie; mais demeureront libres, comme toutes autres marchandises et denrées non comprises en l'article précédent; et en sera le transport permis, mesme aux lieux ennemis de la Couronne d'Espagne, sauf en Portugal, comme il a été dit, et aux villes et places assiegées, bloquées ou investies.

§ 132. The Dutch were not slow to follow the example of the Hanse Towns, and of Spain, and in 1662 concluded a treaty at Paris, with Louis XIV, whereby they agreed to limit the catalogue of Contraband of War to the articles enumerated in the Treaty of the Pyrenees. England and Sweden on the other hand kept themselves aloof, as they had agreed by a treaty concluded at Whitehall on 21 Oct. 1661, to maintain the more severe rule. It was provided by Art. XI of that Treaty, as follows:—

Treaty of Whitehall in 1661.

Cautum tantummodo sit interim ne merces ullæ vocatæ contrabandæ, et specialiter nec pecunia nec commeatus, nec arma, bombarda cum suis igniariis et aliis ad eas pertinentibus, ignes missiles, pulvis tormentarius, fomites, alias lunten, globi, cuspides, enses, lanceæ, hastæ, bipennes, tormenta, tubi catapultarii, vulgo mortaria, inductiles sclopi, vulgo petardæ, glandes igniariæ, missiles, vulgo granadæ, furcæ sclopetariæ, bandaliers, salpetræ, sclopeti, globuli seu pilæ quæ sclopetis jaculantur, cassides, galeæ, thoraces loricatæ, vulgo cuirasses, et similia armaturæ genera, milites, equi, omnia ad instruendos equos necessaria, sclopethecæ, balthei et quæcunque alia bellica instrumenta, uti nec naves bellicæ et præsidiariæ hostibus suppeditandæ devehantur ad alterius hostes, sine periculo, quod prædæ cedant absque spe restitutionis. Neque confœderatorum alteruter sinat ut suorum cujusquam operâ hostes aut perduelles alterius utantur, navesque vendantur, commodentur, ullove modo usui sint alterutrius hostibus aut perduellibus, ad ejus incommodum aut detrimentum; alterutri autem confœderatorum ejusve populo subditive cum alterius hostibus commercium habere, iisque merces quascunque (de quibus supra exceptum non est,) advehere licebit, idque, sive ullo impedimento, nisi iis in portubus, locisque, qui ab altero obsidentur; quod si acciderit, vel obsessoribus bona sua divendere vel ad alium quemvis portum non obsessum libere se conferre permissum est[43].

It will be observed, however, that whilst these two

[43] Dumont, Traités, Tom. VI. Pt. II. p. 385.

Powers agreed to consider money, provisions, and ships, as prohibited articles, and so far in respect of Contraband of War adhered to the stricter practice, they proposed to adopt a more lenient rule in regard to cargoes going to besieged and blockaded towns, as instead of such cargoes, if captured on their way to such towns, being subject to Confiscation, they were made liable to Preemption only on the part of the captors. The provisions of this Treaty were renewed between Sweden and Great Britain in other treaties of Commerce concluded respectively in 1664, 1665, and 1666[44]. Sweden, however, in the year 1667 concluded a treaty at the Hague (16 July 1667) with the United Provinces, under which, in order to put an end to all controversy as to what merchandise should be regarded as Contraband of War, the two Nations agreed to adopt the catalogue already referred to, as having been introduced by France into her treaties with Spain and the United Provinces[45]. Great Britain very shortly afterwards, by the Treaty of Breda (31 July 1667), entered into the same system of concert as to Contraband of War with the United Provinces, having previously, by the Treaty of Peace and Commerce concluded with Spain at Madrid on March 14, 1667, agreed with that Power to adopt the rule of the Treaty of the Pyrenees. At last, by the Treaty of St. Germain en Laye (24 Feb. 1677), Great Britain and France came to a common

Treaties of Breda and Madrid in 1667.

Treaty of St. Germain en Laye of 1677.

[44] The Treaties of 1664 and 1665 are referred to in the first article of the Treaty of 1666. Dumont, Traités, Tom. VI. Pt. III. p. 83.

[45] Art. III. Ut vero evitentur penitus atque amoveantur controversiæ et disceptationes, quæ ob designandam jam dictam mercem de Contrabanda oriri aliquando possent, convenit utrinque, ac pro re rata habitum est, hoc in numero duci et censeri oportere arma quævis ad vim tam propulsandam quam inferendam apta, præsertim, &c. Schmauss, Corp. Jur. Gent. Acad. p. 891.

understanding on the subject of Contraband in these terms :—

Item. L'on pourra faire trafic pendant la Guerre des mêmes marchandises que l'on peut négocier en temps de Paix à la reserve de celles de Contrebande, qui sont expliquées dans l'article suivant.

ART. III. Les marchandises défendues et de Contrebande sont les canons et leurs assortimens, armes à feu, poudre, mèches, boulets, picques, épées, lances, hallebardes, pertuisannes, bombes, mortiers, pétards, grénades, fourches de mousquets, bandoulières, salpêtres, balles, casques, morions, cuirasses, et autres armes semblables. Est encore prohibé sous le dit nom, le transport de gens de guerre, de chevaux, de harnois, de fourreaux de pistolets, de baudriers, et assortimens façonnez et formez à l'usage de la guerre.

ART. IV. Au nombre de marchandises de contrebande et défendues ne sont comprises les marchandises suivantes: sçavoir, les étoffes et manufactures de laine, lin, soye, coton, et de quelque autre matière que ce soit: toutes sortes d'habits et vestemens, et les étoffes et sortes desquelles on les fait, or et argent monnoyé et non monnoyé, estain, fer, plomb, cuivre, charbon, blez, orges, et autres grains et legumes, tabac, espiceries, chairs salées et fumées, poisson sec et salé, fromage, beurre, bière, huile, vin, sucre, sels, et tout ce qui appartient à la nourriture et sustentation de la vie. Ne seront aussi compris dans les marchandises défendues, les cotons, chanvres, lins, poix, cordages, voiles, anchres, mats, planches, poultres et bois travaillé de toutes espèces d'arbres, et qui peut servir à construire des vaisseaux ou à les radouber; et demeureront les dites marchandises libres, de même que toutes les autres généralement qui ne sont comprises dans l'article précédent.

Free traffic in all the above articles was secured to the merchants of either Nation, not merely between neutral and enemy ports, but from one enemy port to another enemy port. "Ne pourra néammoins ledit transport être fait aux villes et places assiégées, ou bloquées, ou investies[46]."

[46] Dumont, Traités, Tom. VII. Part I. p. 327.

§ 133. It will be convenient to notice in the present place the provisions of the Treaty of Whitehall (22 August 1689) concluded between Great Britain and the United Provinces. Lord Liverpool[47] speaks of it as a convention between the two allied Powers "to prohibit totally the commerce of neutral Powers with France;" and Dr. Phillimore[48] condemns it as an attempt to enforce a doctrine, that neutral States are not entitled to carry on, upon their own account, a trade with a belligerent. But this convention, if carefully examined, will be found to be not an agreement between the two Powers to revive the ancient practice, which was fast falling into desuetude, of forbidding by proclamation all commerce whatsoever between neutral merchants and the ports of a belligerent Power, but a compact between the two Powers to establish a blockade of all the ports, harbours, and roadsteads, of the French King[49], and to notify their resolution to all neutral States. It is not surprising that Puffendorf[50] was of opinion that this Convention was justifiable, for under the more lenient practice of the present century a blockade of all the ports, harbours, and roadsteads of the enemy has been maintained by Great Britain against

Treaty of Whitehall of 1689.

[47] Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. London, 1801, p. 37.

[48] Phillimore's Commentaries on International Law, Vol. III. p. 238.

[49] "Il est nécessaire qu'on employe toutes ses forces, et particulièrement qu'on passe en sorte que tout commerce et trafficq avec les sujets dudit Roi très Chrétien soit effectivement rompu et interdit, pour ôter au dit Roi et à ses sujets les moyens de fournir à une guerre, qui pourra autrement par sa durée estre très nuisible, et causer une grande effusion du sang Chrestien, et sa dite Majesté de la Grande Bretagne et les dits Seigneurs Estats Généraux ayant pour mieux y parvenir ordonné à leurs flottes de faire voile vers les Costes de France, et *de bloquer tous les Ports, Havres et Rades dudit Roi très Chrêtien.*" Dumont, Traités, Tom. VII. Part II. p. 238.

[50] See a Letter of Puffendorf, in Groningii Bibliotheca Universalis Librorum Juridicorum, p. 105.

France, and by France and Great Britain against Russia, and by the United States of North America against the Confederate States. Vattel[51], in commenting upon this Treaty, appears not to have fully considered it in its bearing upon the practice of blockade, as maintained by the States General in their Resolutions of 26 June 1630[52], for he speaks of it as if it were simply an agreement between the two Powers to attack every ship bound to or coming from any port of France, and to declare it lawful prize; and when he goes on to say that "Sweden and Denmark, from whom some ships had been taken, entered into a convention on 17 March 1693, for the purpose of maintaining their rights and procuring just satisfaction, and that Great Britain and the States General, being convinced that the complaints of the two Crowns were well founded, did them justice[53]," he has not weighed carefully the recitals in the Convention which was concluded between the two Baltic Powers on this occasion. It would appear from these recitals that the special grievances, of which the two Baltic Powers complained, were not the capture and condemnation of their vessels bound to or from the ports of the enemy, but the capture of vessels under convoy, and the capture of vessels notwithstanding their passports were in perfect order and in conformity with the treaty-engagements between the two Baltic Powers and the respective belligerent Powers. It may well have been the fact that Great Britain and the United Provinces, as belligerent allies, were guilty of a breach of their treaty-engagements with the Baltic Powers in the case of certain vessels, which had been

[51] Droit des Gens, L. III. c. 7. § 112.

[52] Robinson's Collectanea Maritima, p. 158.

[53] Dumont, Traités, Tom. VII. Part II. p. 325.

captured and condemned contrary to their treaty-engagements, and upon the complaint of the two Crowns did them justice, without the allied Powers being open to the imputation, that, by attempting to prevent all commerce with France, Great Britain and Holland were guilty of a grievous violation of International Law[54].

Opinion of Sir Leoline Jenkins.

§ 134. The state of the question as to Contraband of War at the conclusion of the seventeenth century had been relieved of much ambiguity by the treaties, under which the various Powers of Europe, which had any pretensions to be considered maritime Powers, not merely placed on record their deliberate recognition of a catalogue of contraband articles, but agreed that all other merchandise not comprised in that catalogue, as between the contracting parties, might be freely transported to enemy-ports, except when such ports were besieged or blockaded. We find accordingly that when a Spanish privateer in 1674 seized a Swedish vessel bound to Rouen with a cargo of pitch and tar, the property of a British subject, and the Spanish Admiralty Court was proceeding to condemn the cargo as Contraband of War, Spain being at such time at war with France, Sir Leoline Jenkins gave his opinion to King Charles II, that "there was no pretence to make pitch and tar belonging to British subjects Contraband; these commodities, not being enumerated in the 24th article of the Treaty made between Great Britain and Spain in 1667, are consequently declared not to

[54] The second article of the Treaty of Whitehall, whereby it was agreed that all vessels captured on their way to French ports, and all vessels laden with merchandise destined to France, wheresoever seized, should be treated by the competent tribunals as prize of war, seems to have been merely a Conventional affirmance of the doctrine, that the inception of a voyage to a blockaded port constituted a breach of the blockade.

be Contraband in the article next following." Sir Leoline Jenkins then proceeds to consider by what law the question should be decided, in case the benefit of the treaty-engagements between Great Britain[54] and Spain could not be claimed in behalf of British goods laden in a Swedish bottom; and he says, "These goods, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law but by the general Law of Nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that Law in this case, but what is directly and immediately subservient to the uses of war, except in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with." It would appear from the above passage that the opinion of this eminent civilian was, that there were three classes of goods contraband by the Law of Nations. 1. Goods directly and immediately subservient to the purposes of war, if they were being transported over sea to any place within the dominions of the enemy: 2. Goods of all kinds, if they were being carried to a besieged or blockaded town: 3. Goods which the belligerent had, by public notice, forbidden all merchants alike to carry to the enemy, and which, notwithstanding such notice, were being transported over sea to the enemy's country.

Treaty of Utrecht of 1713.

§ 135. The Treaty of Utrecht (11 April 1713) may be considered as the first great international recognition of the more lenient practice, which had been inaugurated by Spain and France at the Peace of the Pyrenees, and to which Great Britain had given in her complete adherence by the Treaty of St. Germain en Laye. The provisions of the latter

[54] Life and Correspondence of Sir Leoline Jenkins, Vol. II. p. 751.

Treaty having ceased to be operative by reason of the war of the Spanish succession, the Dutch being in that war the allies of Great Britain and of the Germanic Empire and of Portugal, whilst Spain was the ally of France, the links of the European Compact upon the subject of Contraband of War required to be reknit together upon the settlement of Peace. Accordingly, amongst the numerous Treaties concluded at Utrecht on the part of France with the Powers arrayed against her, a Treaty of Navigation and Commerce with England will be found, in which the question of contraband and free goods was dealt with in a still more explicit manner than in the previous Treaty of 1677 :—.

ART. XVIII. This liberty of Navigation and Commerce shall extend to all kind of Merchandises, excepting those only which follow in the next Article, and which are signified by the name of Contraband.

ART. XIX. Under this name of Contraband or Prohibited Goods, shall be comprehended Arms, great Guns, Bombs, with their Fusees, and other things belonging to them, Fire Balls, Gunpowder, Match, Cannon Ball, Pikes, Swords, Lances, Spears, Halberds, Mortars, Petardes, Granadoes, Saltpetre, Muskets, Musket Ball, Helmets, Head Pieces, Breast Plates, Coats of Mail and the like kinds of Arms proper for arming Soldiers, Musket rests, Belts, Horses with their Furniture, and all other Warlike Instruments whatever.

ART. XX. These Merchandises which follow shall not be reckoned among prohibited Goods, that is to say, all sorts of Cloaths and all other Manufactures woven of any Wooll, Flax, Silk, Cotton, or any other Materials whatever, all kinds of Cloathes and Wearing Apparel, together with the Species whereof they are used to be made, Gold and Silver as well coined as uncoined, Tin, Iron, Lead, Copper, Brass, Coals [55], as also Wheat and Barley and any other kind of Corn, and Pulse, Tobacco, and likewise all manner of Spices, Salted and Smoked Flesh, Salted Fish, Cheese and Butter, Beer, Oils, Wines, Sugars, and all sorts of Salt, and in general all Pro-

[55] Carbones Focarii. Schmauss, Corp. Jur. Gent. Acad. p. 1344.

visions which serve for the Nourishment of Mankind and the Sustenance of Life. Furthermore all kinds of Cotton, Hemp, Flax, Tar, Pitch, Ropes, Cables, Sails, Sail Cloths, Anchors and any parts of Anchors, all Ship Masts, Planks, Boards and Beams of what Trees soever and all other things proper either for Building or Repairing Ships, and all other Goods whatever which have not been worked into the Form of any Instrument or thing prepared for War by Land or by Sea, shall not be reputed Contraband, much less such as have been already wrought and made up for any use, all which shall wholly be reckoned among free Goods, as likewise all other Merchandises and Things which are not comprehended and particularly mentioned in the preceding Article, so that they may be transported and carried in the freest manner by the Subjects of both Confederates even to places belonging to an Enemy, such Towns and Places being only excepted as are at that time besieged, blocked up round about, or invested [56].

British Treaty-engagements.

§ 136. The provisions in the Treaty of Utrecht were renewed almost in identical language in the Treaty of Navigation and Commerce concluded between Great Britain and France at Versailles on 26 Sept. 1786[57]. The engagements however of this Treaty were terminated by the war of the French Revolution, it being the rule of Great Britain to regard all treaty-privileges as annulled by the outbreak of war between the contracting parties; and any difficulty in observing this rule, which might have been raised by the dethronement of the Bourbon Dynasty, was removed by the Decree of the French Convention published on 1 March 1793, whereby it declared that "all treaties of alliance or of commerce existing between the former French Government and the Powers with whom the Republic is at war, are annulled." No subsequent treaty on the subject of

[56] This English version of the Treaty of Commerce and Navigation is copied from the Compleat History of the Treaty of Utrecht, London, 1715. Vol. I. p. 131.

[57] Martens, Récueil de Traités, IV. p. 169.

Contraband of War has ever been concluded between France and Great Britain. With regard to Spain and Great Britain, the Treaty of 1667 was confirmed and inserted word for word in the Treaty of Navigation and Commerce signed at Utrecht 9 Dec. 1713; which was renewed and confirmed by the Treaty of Versailles of 3 Sept. 1783; and by the first additional article of the Treaty of Madrid, signed on 28 Aug. 1814, all the Treaties of Commerce which subsisted between the two Nations previously to the year 1796 were ratified and confirmed[58]. It would appear therefore that the provisions of the 24th and 25th articles of the Treaty of 1667 as to contraband and free merchandise are still in force[59]. With regard to Sweden and Great Britain, the provisions of the Treaty of Whitehall (21 Oct. 1661) are still in force, having been renewed by the second article of the Treaty of Orebro (18 July 1812[60]). With regard to Denmark and Great Britain, the Treaty of 1670 with the explanatory article of 4 July 1780 as to contraband and free merchandise, was renewed by the seventh article of the Treaty of Kiel (14 Jan. 1814), and is still in force[61]. With regard to Portugal and Great Britain, the Treaty of Rio Janeiro, 19 Feb. 1810, appears to have been the first and last Treaty in which the two Nations came to a common agreement on the subject of Contraband. By this Treaty, Great Britain and Portugal agreed to regard as Contraband not merely the articles included in the Catalogue of the Treaty of the Pyrenees, but generally all other articles that may have been specified

[58] Hertslet, Vol. II. p. 271. Martens, N. R. IV. p. 123.

[59] Mr. Manning, in his Commentaries on the Law of Nations, p. 305, considers that there are no Treaties in force between Great Britain and Spain on the subject of Contraband.

[60] Hertslet's Treaties, Vol. II. p. 337.

[61] Hertslet, Vol. I. p. 229.

as Contraband in any former Treaties concluded by Great Britain or by Portugal with other Powers: but this Treaty ceased to be in vigour after 30 April 1836, by virtue of a notification made, on the part of Great Britain, in pursuance of the provisions of the 33rd article[62] and no provision has been made on the subject of Contraband of War in the subsequent Treaty of Commerce concluded between Great Britain and Portugal on 3 July 1842[63]. The Treaties between Great Britain and the United Provinces have not been renewed with the Netherlands, nor have the Treaties on the subject of Contraband, which formerly existed between Great Britain and Russia, been renewed, for all that was provided by the Treaty of Peace between Great Britain and Russia, signed at Orebro[64] on 18 July 1812, was that the relations of friendship and commerce between the two countries shall be re-established on both sides upon the footing of the most favoured Nations. The Treaty of Orebro was determined by the war of 1854–56; but there was a provision in the 32nd article of the Treaty of Paris[65] (30 March 1856), by which the commerce of the subjects of the contracting parties was re-established on the footing of the treaty-engagements in vigour before the war, until they should be renewed or replaced by new Acts, and the subjects of all the contracting parties in all other matters were to be treated on the footing of the most favoured Nation[66]. A subsequent

[62] Hertslet, IV. p. 362. V. p. 413.

[63] Ibid. VI. p. 598.

[64] Ibid. II. p. 128. Martens, N. R. III. p. 226.

[65] Martens, N. R. Gén. XV. p. 780.

[66] It was held by the English Court of Admiralty in the case of the Quatre Frères, 27 Nov. 1778 (Hay and Marriott's Reports, p. 171), that the Treaty of Copenhagen, Art. XL. (11 July 1670), did not give to the Danes the privilege of Free Ship Free Cargo in time of war, which was

Treaty[67] of Commerce and Navigation between Great Britain and Russia was signed at St. Petersburg on 2 Jan. 1858, which is silent on the subject of Contraband of War.

Concert of European Nations as to certain articles.

§ 137. It deserves to be remarked, that the list of contraband articles adopted in the Treaty of St. Petersburg[68], concluded between Russia and Great Britain on 20 June 1766, is less extensive than the catalogue of the Treaty of the Pyrenees; and that Russia, Spain, France, Prussia, Austria, Sweden, Denmark, Holland, and Sardinia, have all at various times concurred in declaring the articles included in that list to be Contraband of War according to Natural Law. The list is as follows :—

ART. XI.[69] Tous les canons, mortiers, armes à feu, pistolets, bombes, grénades, boulets, balles, fusils, pièrres à feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, épées, ceinturons, poches-à-cartouche, selles et brides, au-delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, ou au delà de celle qui doit avoir chaque homme servant sur le vaisseau ou passager, sera reputés munitions ou provisions de guerre, et s'il s'en trouve, ils seront confisqués selon les loix, comme contrebande ou effets prohibés. Mais ni les vaisseaux, ni les passagers, ni les autres marchandises, qui s'y trouveront en

granted by Great Britain to the Dutch in the Treaty of 1674. The words of the 40th Article were, "If the Hollanders or any other Nation whatever have, or shall obtain from his Majesty of Great Britain any better articles, agreements, exemptions, or privileges, than what are contained in this Treaty, the same like privileges shall be granted to the King of Denmark and his subjects also, in a most full and effectual manner." According to this decision, "the most favoured Nation clause" must, unless otherwise specified, be limited in its operation to commercial privileges in time of peace; which seems to be a reasonable construction of it.

[67] Martens, N. R. Général, XVI. p. 490.

[68] Martens, R. I. p. 395. The provisions of this Treaty on the subject of Contraband were renewed in the Treaty of 1797 (Martens, R. VI. p. 362), and recognised in the Treaty of 1801 (Martens, R. VII. p. 262).

[69] Martens, Récueil, I. p. 395.

même temps, ne seront point détenus, ni empêchés de continuer leur voyage.

One result of the Armed Neutrality of 1780 was to lay the foundation of a Common Concert amongst the Continental Powers on the subject of Contraband of War, although such concert could only take effect amongst the Powers which were parties to the Treaties and Declarations[70]; for it was not attempted on occasion of either of the Armed Neutralities of 1780 or 1800 to set aside the treaty-engagements as to Contraband of War, which existed between Great Britain and the Powers respectively which were parties to either Armed Neutrality; on the contrary, there were express stipulations that in the matter of Contraband, each State should adhere to its existing engagements with other States. It is consistent therefore with the Custom of contracting, which prevails amongst the European Powers, that the same Nation should have different Conventions on the subject of Contraband of War with different Nations. "Hence it arises, that the catalogue of Contraband has varied very much," as observed by Lord Stowell, "and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions[71]."

Bynkershoek's view.

§ 138. Reference has been already made to the opinion of Grotius upon the question, what we may lawfully do to those who are not our enemies and yet supply our enemies with certain things[72]. Bynkershoek, in considering the same question at the interval

[70] The Declarations of Prussia on the subject of Contraband of War will be found in Martens, III. p. 247; and that of Austria in Martens, III. p. 258.

[71] The Jonge Margaretha, 1 Ch. Robinson, p. 192.

[72] Supr. 128.

of more than a century[73], questions the opinion of Grotius, that there is "an intermediate class of articles of promiscuous use, which a belligerent may intercept on their way to his enemy, if he cannot defend himself except by intercepting them, under the obligation of making restitution," on the ground that no belligerent can be expected to judge equitably between himself and a neutral merchant as to the existence of such necessity, as will warrant him in intercepting the goods of the latter, whilst the practice of Nations does not affirm any such distinction. Bynkershoek contends that there is a Common Law of Nations, founded upon reason and usage, and that whilst reason suggests that we should be friends in an equal manner to our friends, although they should be enemies to each other, the Usage of Nations in such matters may be gathered from the perpetual tenor of the conventions and declarations of Sovereign Princes. "Dixi," he says, "ex perpetua quodammodo consuetudine, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat[74]." But Bynkershoek, in discussing the practice of Holland, justifies an Edict of the States General, published on 31 Dec. 1657, during a war with the Portuguese; by which, after forbidding articles Contraband of War to be carried to Portuguese ports, they go on to prohibit ship timber and naval stores being conveyed to Portugal, on the ground that they had nothing to fear from the Portuguese except by sea, and that the Portuguese could not carry on the war without supplies of ship timber. He justifies with equal inconsistency analogous Edicts published by the Dutch on 5 Dec. 1652 against the British, and

[73] Bynkershoek's Quæstiones Juris Publici were published in 1737.

[74] Quæstiones Juris Publici, L. I. c. 10.

on 9 March 1689 against the French. He cites these Edicts indeed as exceptions which prove the rule, on the ground that the Dutch, having forbidden all trade in Contraband of War *generally*, go on to forbid these articles *specially* to be carried by neutrals to the enemy's country. But in thus citing the practice of the Dutch, he holds it to be lawful for a belligerent under special circumstances to forbid other articles, besides what are Contraband of War, to be carried to the enemy; and he accordingly admits a class of things, which if not at all times Contraband, may become Contraband under circumstances. There would thus seem to be no substantial difference between the views of Bynkershoek and those which Grotius advocated.

Vattel.

§ 139. Vattel[75], on the other hand, having stated that neutral Nations ought to enjoy perfect liberty to trade in ordinary goods which have no relation to war, as the belligerent is not authorised by the care of his own safety or the necessity of self-defence to prevent the importation of such goods into the enemy's country, goes on to say, that "commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called Contraband goods. Such are arms, ammunition, timber for shipbuilding, every kind of naval stores, horses, and raw provisions in certain junctures, when we have hopes of reducing the enemy by famine." It will be seen from the above passage that Vattel holds that a belligerent may rightfully prohibit a neutral to carry to the enemy anything which may be useful to him in war, and that all articles so prohibited become Contraband of War.

Italian and Spanish Jurists.

§ 140. Italian jurists, such as Lampredi and Azuni, recognise no other source of law as to Contraband of

[75] Droit des Gens, L. III. c. 7. § 112.

War than the treaty-engagements of particular Nations, coupled with the usage of other Nations conforming themselves by Comity to the practice of those particular Nations under their treaty-engagements.

D'Abreu, on the other hand, and other Spanish authors, agree that neutrals are prohibited by every kind of law from carrying munitions of war to the enemy's country, and that a belligerent does only what is his Right in capturing such articles on their way to the enemy's ports; but they hold that a neutral may rightfully carry provisions to any but besieged or blockaded places: and in support of this latter position D'Abreu refers to the Treaty of 1650 concluded with the Dutch, the Treaty of 1667 concluded with the English, and the Treaty of Commerce concluded with the Emperor in 1725. "From what we have said," he concludes, "it follows that a belligerent may justly capture vessels which are conveying arms and munitions of war to the enemy, and that those vessels which convey provisions to them, ought to be protected from violence, excepting when such provisions are being conveyed to a besieged or blockaded place[76]."

French Jurists.

§ 141. Valin, amongst the older French writers, holds that provisions are not Contraband of War by the Law of Nations, except they are being carried to besieged or blockaded places; but he admits that naval stores have by the usage of Nations come to be regarded as Contraband, and that munitions of war may be rightfully captured by a belligerent under any circumstances, if they are being carried to the dominions of the enemy. Amongst the more recent French writers who have treated professedly of Neutral Com-

[76] Tratado Juridico-Politico sobre Pressas de Mar, cap. 11. § 15. D'Abreu expressly bases his opinion as to provisions upon the treaties between Spain and various European Powers.

merce in time of war, M. de Hautefeuille occupies a more advanced position than Valin was content to take up, in restraining the exercise of belligerent right, when he maintains that there is only one class of articles which are properly Contraband of War; namely, objects which are both necessary and exclusively useful for belligerent purposes, and which are directly available for such purposes without undergoing any change. He excludes naval stores altogether from the list of contraband[77]. M. Ortolan[78], on the other hand, holds that munitions of war and supplies of all sorts, which serve directly and exclusively for the purposes of war, are absolutely and necessarily Contraband of War, whilst other articles, which are useful in peace but can also be adapted to the purposes of war, may, under particular circumstances, be declared Contraband; on the other hand he maintains that provisions can never be considered Contraband of War, unless they are being carried to a blockaded place. With regard to the catalogue of Contraband articles, M. Ortolan considers that the list must necessarily vary with the application of science to the purposes of war. In this respect he agrees with Lord Erskine, who, in the course of the debate in the House of Lords on the Orders in Council issued in 1808, observed, that the King may make new declarations of Contraband, when articles come into use as implements of war, which were before innocent; this is not the exercise of discretion over Contraband; the Law of Nations prohibits Contraband, and it is the *usus bellici* which, shifting from time to time, make the law shift with them[79].

[77] Des Droits et Des Devoirs des Nations Neutres, Tit. VIII. § 5. Art. 4.

[78] Diplomatie de la Mer, L. III. c. 6.

[79] Lord Erskine's Speech on March 8, 1808. 10 Cobbett's Parliamentary Debates, p. 958.

§ 142. In the conflict of authority among text-writers, and amidst the fluctuations of practice amongst Nations, the British Courts of Admiralty, in adjudicating upon questions of Contraband of War, have endeavoured, in cases where there have been no treaty engagements on the subject, to pursue a system which should recommend itself to the approval of mankind by its accordance with Reason and by its moderation. They have not hesitated to maintain the doctrine of Conditional Contraband; but they have modified the penalty, when the cargoes have been the produce of the country from which they were exported, and have been staple articles of its commerce. "In the practice of this Court," says Lord Stowell, "there is a relaxation which allows the carrying of these articles (pitch and tar), being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition that it may be brought in not for Confiscation, but for Preemption, no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, although immediately subservient to the purposes of hostility[80]. Again, British Courts have shown indulgence to articles, which are in their native and unmanufactured state. Thus, unwrought iron has been treated with lenience, whilst anchors and other instruments fabricated out of it have been confiscated. Hemp has been more favourably considered than cordage, and wheat than the final preparations of it for

Practice of British Prize Courts.

[80] The Sarah Christina, 1 Ch. Rob. p. 241.

human use[81]. Further, they have allowed the particular destination of the ship to be taken into account to rebut the presumption of the articles in question being destined for belligerent purposes; and in the case of ship-timber have made a distinction, according as the particular destination of the vessel was to a port of general commerce, or a port of naval armament. In these and other cases, whilst the Prize Courts have not hesitated to maintain the extreme right of a belligerent to prohibit all trade with the enemy, which is calculated, under circumstances, to subserve the purposes of war, they have allowed equitable deductions to be made from the exercise of that right, wherever the *bona fides* of the neutral trader, or the innocuous character of the actual trade itself, was capable of being established.

Difficulty of specifying articles conditionally contraband.

§ 143. The expression "*conditional Contraband*" has been designedly used in the preceding passage to mark the contrast with "*absolute Contraband*" of War. The term "conditional Contraband" is intended to denote such articles as are *ancipitis usûs*, and accordingly are not always, but only under certain conditions, unlawful merchandise for neutrals to carry to an enemy. Certain Publicists, in discussing the unsettled character of the conditions, under which certain articles may be free at one time, and at another time unfree, for neutrals to convey to the enemy's country, have expressed an opinion that it would be desirable, if Nations would settle by some common compact, what articles to the exclusion of all other articles shall be deemed Contraband of War. It is obvious, however, that the necessities of a Continental Power in time of war may not be the same with the necessities of an Insular Power: for instance, horses may be necessary to enable an army

[81] The Jonge Margaretha, 1 Ch. Rob. p. 194; ibid. p. 195.

to move by land, whilst naval stores will be necessary to enable a navy to move by sea. Horses[82] may accordingly be prohibited with justice to be conveyed by a neutral merchant to the ports of a Continental Power, whilst naval stores may by parity of reason be with justice prohibited to be carried to the country of an Insular Power. On the other hand, horses will be useless appendages to a fleet, whilst naval stores will be equally unserviceable to land forces. There are without doubt certain articles, which all Nations have agreed in practice to regard as unlawful for neutral merchants to convey by sea to the dominions of a belligerent Power, and such articles, if captured upon their voyage, are by all Courts declared to be lawful Prize of War to the captors. If however it should be desirable in the interests of International Commerce, that some attempt should be made to render the law of *conditional Contraband* less vague, the opinion, which Sir Leoline Jenkins submitted to King Charles II, in regard to a cargo of pitch and tar, which had been captured and confiscated by the Spaniards, may be worthy of attention. "Nothing," said that eminent civilian, "ought to be judged contraband by the Law of Nations, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general Notification made by Spain to all the world, that they will condemn all the Pitch and Tar they meet with." If a Belligerent Power at the commencement of a war should notify to all Neutral Powers what are the articles of ambiguous use (*ancipitis usûs*) which it intends to confiscate, if they should be intercepted by its cruisers in the

[82] Russia has never allowed horses to be enumerated in the list of Contraband in any of her treaty-engagements.

course of transport on the High Seas to the enemy's dominions, neutral merchants would have a warning analogous to that, which is conveyed to them by the Notification of a blockade, after which Notification a belligerent Power is held to be entitled by the Law of Nations to capture and confiscate all vessels and cargoes, which attempt to trade with a blockaded port. As an instance however of the difficulties which are in the way of Nations coming to any common agreement, as to what articles shall be conditionally Contraband of War, Mr. Robert Ward refers to the case of Bulls' Hides, as being goods "which are in themselves seemingly a very innocent article of traffic, and in the American war Neutrals might, for a long time, have been safely permitted to supply them to Spain. But when the floating batteries, destined for the destruction of Gibraltar, were fitting at Algeziras, and it was known that Hides were to be the chief article of defence to be used in that famous attack, I have no doubt that a ship loaded with Hides, and destined for that port of equipment, with a knowledge that they were then wanted, might very justly have been stopped, and even confiscated[83]."

General doctrine of British Prize tribunals.

§ 144. The general doctrine of the British Prize Courts on the subject of Contraband of War is to be gathered from the decisions of those Courts during the wars of the first French Revolution. In the recent war of 1854–56 with Russia there was hardly any occasion for the subject of Contraband of War to be discussed in any British Court, seeing that the allied Powers placed all the ports and coasts of Russia both in the Baltic and in the Black sea under Blockade, and the proceedings in the British Prize Courts were instituted for the most part in

[83] Ward's Essay on Contraband, London, 1801, p. 248.

cases of neutral commerce, to punish attempts to violate the Blockade. The British Courts of Prize have however invariably confiscated all instruments and munitions of war, under which head are embraced all kinds of cannon and guns with their appurtenances, such as ammunition and carriages, arms of every description, and all military equipments and military clothing. To these may be added articles in a natural or imperfectly prepared state, which are used almost exclusively for purposes of war, such as saltpetre and sulphur suitable for making gunpowder, and all kinds of machinery for manufacturing arms or ammunition. In addition to these articles the British Courts have condemned vessels[84] evidently built for warlike purposes, such as gunboats and mortar-boats destined to be sold to the enemy, and all kinds of articles which are not in their native and unmanufactured state, and which are fitted for the building and equipment of ships of war, such for instance as masts, spars, rudders, sails, sail-cloth[85], cordage, rigging, anchors[86], and sheet-copper[87]. Articles on the other hand which are susceptible of being used for military and naval purposes, but are in a native and unmanufactured state, have been dealt with by the Courts as articles of equivocal use, which may or may not be condemned as Prize of War, according to the character of the port from which they are exported, and of the port to which they are bound. If they are for instance the produce of the country from which they are exported,

[84] The Brutus before the Lords 27 July 1804, cited in Appendix to 5 Ch. Rob. p. 408. The Richmond, 5 Ch. Rob. p. 325.

[85] The Neptunus, 3 Ch. Rob. p. 108.

[86] The Stadt Embden, 1 Ch. Rob. p. 29.

[87] The Charlotte, 5 Ch. Rob. p. 277. Sheet-copper was enumerated amongst articles of contraband "serving directly to the equipment of vessels" in article 10 of the treaty of 1794 between Great Britain and the United States.

and are the property of its subjects or citizens, and are staple articles of its commerce in time of peace, they have not been condemned as unlawful articles of neutral trade, except when the ship has been bound to a port of military or naval armament. Thus pitch[88] and tar, hemp[89], rosin[90], ship timber in balk[91], planks, unwrought iron[92], and other articles, have been under such circumstances treated with leniency. So likewise provisions have been held by Sir William Scott to be generally not Contraband, for instance in the case where they were the growth of the country from which they were exported[93], and not bound to a port of naval equipment; but all articles of human food have been held to be Contraband, when it was probable that they were intended for naval or military use. Thus corn, flour, meal, rice, sea-biscuits, salt, salt fish, wine, brandy, butter, cheese, have been condemned as Contraband of War, when destined to a port of naval equipment[94], unless it has been established that the articles were from their superior quality not adapted for naval use, but were merely luxuries for the service of domestic tables[95].

The doctrine of the British Prize Courts on the subject of provisions being conditionally Contraband of War, was approved by the United States in Congress[96] in 1775, when they declared that all

[88] The Sarah Christina, 1 Ch. Rob. p. 241.

[89] The Apollo, 4 Ch. Rob. p. 158.

[90] Nostra Signora de Begona, 5 Ch. Rob. p. 98.

[91] The Twende Brodre, 4 Ch. Rob. p. 33.

[92] The Ringende, Jacob, 1 Ch. Rob. p. 89.

[93] The Jonge Margaretha, 1 Ch. Rob. p. 194. The Apollo, 4 Ch. Rob. p. 158.

[94] Cheeses were condemned in the Zelden Rust, 6 Ch. Rob. p. 93. The Frau Margaretha, Ibid. p. 92. Biscuits were condemned in the Ranger, 6 Ch. Rob. p. 125. Wines in the Edward, 4 Ch. Rob. p. 68.

[95] The Weelvaart, 25 August 1799, cited in note 1 Ch. Rob. p. 195.

[96] Journals of Congress, Vol. I. p. 241. Kent's Commentaries of American Law, Vol. I. p. 140.

vessels to whomsoever belonging, carrying provisions or other necessaries to the British army or navy within the Colonies, should be liable to seizure and confiscation. They have also been adopted to the fullest extent by the Courts[97] of the United States; and it may well be doubted whether, in the case of the Commercen, those Courts have not gone beyond any precedent furnished by the Prize Courts of Great Britain. In the case of the Commercen, a Swedish vessel was carrying a cargo of provisions the property of English merchants to a Spanish port, there to be delivered to the Commissary of the British army engaged in hostilities against France in Spain. Great Britain was at such time at war with the United States, and also at war with France; but there was no alliance or common action between France and the United States. Sweden and Spain, on the other hand, were the allies of Great Britain in the war against France; but were neutral in the war against the United States. The cargo was condemned as enemy's property, but the ship was released, and in the District Court of Maine freight was allowed according to the rule of the Consolat del Mar and the ancient practice in cases, where enemy's goods are captured on board a neutral vessel. But Mr. Justice Story, in the Circuit Court of the United States[98], reversed the judgment of the Court below, so far as it allowed freight, and held that although strictly speaking it was not a question of Contraband, for that can arise only when the property belongs to a neutral, and in this case the property belonged to an enemy, yet that the shipowner, in carrying provisions for public use, and under a public contract, was assisting the military operations of the

[97] Maisonnaire et al. *v.* Keating, 1 Gallison, p. 325.

[98] The Commercen, 1 Gallison, p. 260.

enemy. He pronounced accordingly the voyage to be illicit, and inconsistent with the duties of neutrality, equally as the carrying of the enemy's despatches, or the conveyance of military personages in his employ. The Supreme Court of the United States affirmed this judgment by a majority of four against three Judges, Mr. Justice Story himself forming one of the majority, and Chief Justice Marshall being in the minority. The latter eminent judge was of opinion, that "a remote and consequential effect of an act was not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be direct and immediate. It is also necessary that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot turn a friend into an enemy[99]." Mr. Justice Livingstone and Mr. Justice Johnson concurred with the Chief Justice, that "Sweden, being the ally of Great Britain in the Peninsular war, her subjects had an indubitable right to transport provisions in aid of their Nation, or its allies. The owner therefore had a right to his freight; for he did not act inconsistent with our belligerent rights, while in the direct and ordinary exercise of those rights, which a state of war conferred on himself."

British Treaty with United States in 1796.

§ 145. The distinction between *absolute Contraband* of War and *conditional Contraband* of War has been fully recognised in the first Treaty of Commerce concluded between Great Britain and the United States on 4 Nov. 1796[100]. The list of absolute Contraband is worthy of note, as the same list, with a slight variation, has been adopted in the Treaty of Commerce concluded between Great Britain and Brazil on 17 Aug. 1827[101].

[99] 1 Wheaton, p. 382. [100] Martens, Récueil, V. p. 674.
[101] Martens, N. R. VII. p. 479.

ART. XVIII. In order to regulate what is in future to be deemed Contraband of War, it is agreed, that under the said denomination shall be comprised all arms and implements serving for the purposes of war by land or by sea, such as cannon, muskets, mortars, petards, bombs, grenadoes, carcasses, saucisses, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war; as also timber for ship-building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly for the equipment of vessels, unwrought iron and fir planks only excepted; and all the above articles are hereby declared to be just objects of Contraband, whenever they are attempted to be carried to an enemy.

The variation, which is found in the Treaty of Great Britain with Brazil, consists in the substitution of the words "whatsoever may serve directly to the equipment *of vessels of war*," in lieu of the words "whatever may serve directly to the equipment of vessels." The concluding portion of the same article of the Treaty between Great Britain and the United States recognises provisions and other articles as becoming Contraband in certain cases according to the existing Law of Nations. "And whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles not generally Contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so becoming Contraband according to the existing Law of Nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified, and the captors, or in their default the Government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mer-

cantile profit thereon, together with the freight and also the demurrage incident to such detention."

Right of Preemption.

§ 146. The Right of Preemption (*droit d'achat*) is considered by Sir William Scott to be a belligerent right under the Law of Nations, irrespectively of any Convention to that effect. "The right of taking possession of cargoes of this description, *commeatus* or provisions going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent Nations. The ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely: a century has not elapsed, since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of Preemption, that is, to a right of purchase upon a reasonable compensation to the individual, whose property is thus diverted. I have never understood that this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind, or that, on the side of the neutral the same exact compensation is to be expected, which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, or may be driven by his necessities to pay a famine price for the commodity, if it gets there; it does not follow that acting on my Rights of War, in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened: it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid

by the exporter and the expense which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms. But certainly the capturing Nation does not always take these cargoes on the same terms, on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorised exercises of the rights of war[1]." The same learned Judge in dealing with the case of a Swedish ship carrying pitch and tar to a French port, the cargo of which he condemned by reason of there being false cargo-papers on board setting up a pretended neutral destination, observed, "In the practice of this Court there is a relaxation which allows the carrying of these articles (pitch and tar), being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent Right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition, that it may be brought in, not for Confiscation, but for Preemption; no unfair compromise, as it should seem, between the belligerent's Rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities though immediately subservient to the purposes of hostility. To entitle the party to the benefit of this rule, a perfect *bona fides* on his part is required[2]."

The option of a sale to the belligerent had been made a treaty-privilege between Sweden and Great

[1] The Haabet, 2 Ch. Rob. p. 183, 30 August 1800.

[2] The Sarah Christina, 1 Ch. Rob. p. 241, 6 March 1799.

Treaty of Westminster of 1656.

Britain in certain cases by the Treaty of Westminster, concluded on 17 July 1656[3], which treaty, after enumerating what goods and merchandise should thereafter be declared contraband and prohibited, goes on by the third Article to provide as follows: "But it shall be lawful for either of the Confederates and his people and subjects to trade with the enemies of the other, and to carry to them any goods whatever, which are not excepted as above, without any impediment; provided they are not carried to those ports or places which are besieged by the other, in which case they shall have leave either to sell their goods to the besiegers, or to repair with them to any other port which is not besieged." In the subsequent Treaty of Whitehall[4] 21 October 1661, in which a more extensive list of Contraband articles was set forth, the language of the treaty-privilege was slightly varied, it being provided that "it shall be lawful for either Confederate, his people, and subjects, to have commerce with the enemies of the other, and to carry to them all kinds of merchandise, not before excepted, without any let or hinderance, unless it be to such ports and places as are besieged by the other, and in such case it shall be lawful for them to sell their commodities to the besiegers, or otherwise to betake themselves to any other port which is not besieged." But as it had been specified in the earlier part of the same article of that Treaty[5] that neither of the

Treaty of Whitehall of 1661.

[3] Hertslet, II. p. 317. It appears from Whitelocke's Memorials, p. 645, that the Latin Articles of this Treaty were drawn up by John Milton, as the Swedish Ambassador complained of the delay in translating them, and of their having been sent to one Mr. Milton, a blind man, to put them into Latin.

[4] Hertslet, Vol. II. p. 324. Dumont, Traités, Tom. VI. Part II. p. 384.

[5] Art. XI. Although in the preceding Articles of the present Treaty it be forbidden to either Confederate to yield any aid or assistance to the enemies of the other, yet it is not to be so understood, as if either Confederate,

Confederates should suffer any of his subjects to give aid, sell or lend ships, or be in any way useful to the enemy or rebels of the other, to his prejudice or detriment, the British Government contended that the prohibition to give aid, sell or lend ships, or be in any way useful to the enemy, carried with it by implication a prohibition to supply the enemy with the necessaries for building ships, and consequently that pitch and tar were virtually made Contraband of War under this treaty[6]." The English Court of

having no war with the enemies of the other, might not sail to or traffic with the said enemies, notwithstanding that the other Confederate be in actual war with them. But it is only provided that "no goods, called goods of Contraband, and particularly that no money, provision, weapons, fire-arms with their appurtenances, fire-balls, gunpowder, match, bullets, spear-heads, swords, lances, pikes, halberts, ordnance, mortar-pieces, petards, grenadoes, rests, bandeliers, saltpetre, pistols, small shot, pots, head-pieces, backs and breasts, or such kinds of armour; soldiers, horses, all furniture necessary for horses, holsters, belts, and whatsoever warlike instruments; and also that no ships of war or convoys be furnished to the enemy, without peril, in case they be taken, of being adjudged lawful prize without hope of restitution. And neither of the Confederates shall suffer any of his subjects to give aid, sell or lend ships, or be any way useful to the enemies or rebels of the other to his prejudice or detriment; but it shall be lawful for either Confederate, his people and subjects, to have commerce with the enemies of the other, and to carry to them all kind of merchandise not before excepted, without any let or hinderance, unless it be into such ports and places as are besieged by the other, and in such case it shall be lawful for them to sell their commodities to the besiegers, or otherwise to betake themselves to any other port, which is not besieged." Hertslet, II. p. 329.

[6] The doctrine of Contraband by implication was upheld by Sir Robert Wiseman, the King's Advocate General, in certain positions of International Law which he drew up on 23 May 1672, and in which he says, "Setting aside what are by treaties agreed to be Contraband, which must be so esteemed, whatsoever they be, and no other, I also agree that iron, pitch, tar, hemp, clypebard, plancks, excepting wainscott, corn, wine, oyle, salt, will be accounted Contraband, under which all such things which are of a general use of furnishing the war and those that are in arms are properly comprehended." The positions of Sir R. Wiseman, fifteen in number, are set forth at length in Dr. Pratt's work on Contraband of War, p. 255. The author has a copy of them in his possession in a MS. book of Sir Nathaniel Lloyd, Queen's Advocate-General in 1710.

Admiralty, in adjudicating upon such commodities laden in Swedish bottoms, captured on their way to an enemy's port, considered them to be entitled to the benefit of the more favourable rule, and held them, if taken when avowedly going to the enemy, to be brought in for Preemption, not for Confiscation: nevertheless it was thought advisable by the Swedish and British Governments, after the second Armed Neutrality, to make this more favourable rule a matter of treaty-engagement between the two Powers; and accordingly a Convention was concluded at London on 25 July 1803 between Great Britain and Sweden, with a view, as averred in the preamble, to prevent the recurrence of the differences which had previously arisen in relation to the 11th Article of the Treaty of Whitehall (21 Oct. 1661). By the second Article of this Convention it was provided as follows:—

Les croiseurs de la Puissance belligerante exerceront le droit de détenir les bâtimens de la Puissance neutre, allants aux ports de l'ennemi avec des chargemens de provisions et de poix, résine, goudron, chanvre, et généralement tous les articles non manufacturés, servant à l'équipement des bâtimens de toutes dimensions, et également tous les articles manufacturés servant à l'équipement des bâtimens marchands (le hareng, fer en barres, acier, cuivre rouge, laiton, fil de laiton, planches et madriers, hors ceux de chêne et esparres, pourtant exceptés); et si les chargemens, ainsi exportés par les bâtimens de la Puissance neutre, sont du produit du territoire de cette Puissance, et allant pour compte de ses sujets, la Puissance belligérante exercera dans ce cas le droit d'achat sous la condition de payer un bénéfice de dix pour cent sur le prix de la facture du chargement fidèlement déclaré, ou du vrai taux du marché, soit en Suède, soit en Angleterre, au choix du propriétaire, et en outre une indemnité pour la détention et les dépenses nécessaires[7].

[7] Martens, Récueil, VIII. p. 92. This Treaty received a judicial exposition from Lord Stowell, in the case of the Zacheman, 1 May 1804. 5 Ch. Robinson, p. 152.

This Convention appears not to have been renewed by the Treaty of Orebro in 1812[8], as that treaty re-established relations of amity and commerce between the two Crowns, upon the footing on which they existed on 1 January 1791, and all treaties and conventions existing at that time. The more rigorous system, which was founded on the Treaty of 1661, would therefore seem to be revived between the two Nations. Treaty of Orebro of 1812.

§ 147. It appears that pitch and tar and hemp have been at times omitted from the catalogue of Contraband of War in treaties of commerce, where the restriction upon neutral trade resulting from such commodities being regarded as Contraband would not have been attended with mutual inconvenience to both of the belligerent parties. Thus in the diplomatic discussions preliminary to the treaty of 1661[9] the Swedish Ambassador contended in the first place "that in Finland pitch and tar were the chief commodities, which if they did not vend them yearly, having great quantities of them, the country could not subsist, nor would the commodity last above one year in their vessels, but by reason of the great strength of it, being kept longer, it would break the hoops of the vessels and be lost; and if the least restraint should be put upon the vending of it to any place, the inhabitants of Finland would think themselves undone, and it would be a great prejudice to their trade." He urged in the second place, that "it had been taken for granted, when the treaty of Upsal (9 May 1654)[10] was concluded, that these commodities should not be taken for contraband." Mr. Whitelock, the negotiator of the treaty of Upsal, in reply admitted that when he was in Sweden, Treaty of Upsal, 1654.

[8] Martens, Récueil, IX. p. 431. 1656.
[9] Whitelock's Memorials, May [10] Hertslet, I. p. 310.

England being at that time at war with the Dutch, his judgment was not to insist on having pitch, &c. to be Contraband goods, but rather that they should not be esteemed so: "and my reason," he said, "was because the Dutch could have them notwithstanding by small vessels, which should take them in at Hamburg, or have them brought from Lubeck most part of the way by water to Hamburg, and from Hamburg in those vessels they could bring them down the Elbe, and from thence by the Flats, which are shoal waters full of sand on the coast of Bremen, and so along to Holland, without going at all into the open sea, or coming within the danger of our ships, which could not come among those Flats, nor hinder the Dutch from having of those commodities. But on the other side they could not be brought to England but through the wide sea, where they were subject to the danger of being intercepted by our enemies; and if I should have agreed to have them Contraband goods, I conceived the same would have hindered England being supplied, and not have hindered our enemies having of them. But now, I said, our war with Spain had made a great difference as to that matter, because they could not have them but through the wide sea, where they must be brought by us, and we shall watch the conveyance of them."

Equity as to conditional Contraband.

§ 148. In the absence of treaty engagements, under which ships have been enumerated amongst articles prohibited to be transported to the enemy's country[11], a question has sometimes arisen with respect to ships which are going for sale to an enemy's port, the construction of which ships is such, that there can be no doubt that they would be easily convertible to belligerent uses. Where the neutral owner knew that

Ships under circumstances Contraband of War.

[11] Treaty of Westminster of 1654, supr. Treaty of Whitehall of 1661.

his vessel was peculiarly adapted to the purposes of war, and was avowedly going with it to the enemy's country with the intention and expectation of selling it to the enemy to be employed as a vessel of war, Lord Stowell had no hesitation in condemning the vessel as Contraband of War[12]. The same view had been adopted by the Lords of Appeal on 27 July 1804 in the case of the Brutus, which had been recently built at Salisbury, in the State of Massachusetts, pierced for fourteen guns, but with only two mounted to defend her, as alleged, against French privateers. She had been sent on her first voyage to the Havannah with instructions to her master to sell her; and having been captured on her voyage was condemned in the Vice-Admiralty Court of Halifax as Contraband of War[13]. The Lords on this occasion expressed their reason for condemning the vessel as Contraband of War, on the ground that she was built, as the report of the Surveyors clearly established, for purposes of war, not for peace, and was going to be sold to the enemy. On the other hand, where the character of a vessel has been equivocal, and it has been actually engaged in trade, and the occasion for selling it has arisen out of the circumstances attending its employment in trade, the Lords have decreed restitution[14]. The *bona fides* of the merchant has even been allowed to exempt from confiscation, a vessel which had been employed for the purposes of war, but was withdrawn from such uses. Thus in the Raven, Jennings, the vessel had been a French privateer, and had been condemned as such in New York; but it appeared that the purchaser had bought her for the purposes

[12] The Richmond, 5 Ch. Rob. p. 331, 7 Dec. 1804.

[13] The Brutus, 5 Ch. Rob. Appendix, p. 1.

[14] Fanny, Ingraham, 24 March 1804. Neptune, Gibbs, 18 July 1804.

of trade, and having used his best endeavours to make her fit for that service, had found her unsuitable, and was on that account intending to sell her again, the Lords reversed the judgment of the Vice-Admiralty Court of the Bahamas and decreed restitution. It will appear to be the result of the various judgments of the highest British Court of Prize, that though the principle of considering the transport of ships of war to the enemy as contraband is strictly upheld by it, the application of the principle has been restricted to cases in which no doubt existed as to the character of the vessels, or as to the purposes for which they were intended to be sold.

The transport, not the sale of merchandise to the enemy penal under the Law of Nations.

§ 149. By the Ancient Law of Europe, the carrying of Contraband of War to an enemy's port worked a forfeiture of the ship; nor can it be said, as Lord Stowell has justly observed[15], that such a penalty is unjust or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. In the Proclamation[16] issued by King Charles I in 1626, to warn neutrals not to furnish the King of Spain and his subjects with provision for shipping or munition for the wars, or with victuals, it is declared, that "if any person whatsoever after three months from the publication of these presents shall, by any of his Majesty's own ships, or the ships of any of his subjects authorised to that effect, be taken sailing towards the places aforesaid, having on board any of the things aforesaid, or returning thence in the same voyage, having vented or disposed of the said prohibited goods, his Majesty will hold both the ships and goods so taken to be lawful prize, and cause them to be ordered as

[15] The Ringende, Jacob, 1 Ch. Rob. p. 91.

[16] Rymer, Fœdera, Tom. XVIII. p. 856. Robinson's Collectanea Maritima, p. 66.

duly forfeited; whereby his Majesty doth put in practice no innovation, since the same course has been held, and the same penalties have been heretofore inflicted by other States and Princes upon the like occasions, and avowed and maintained by public writings and apologies." This rule appears to have been modified in respect of the return voyage as early as the year 1672, since we find it laid down amongst the positions[17] of Sir Robert Wiseman, King's Advocate, that "nothing is forfeited but what is taken going to the enemy; for after the contraband goods are delivered, neither the ship nor the proceeds of the contraband goods, upon their return, will be liable upon that account to confiscation, much less will any other lading in the ship be confiscated." On the other hand the same eminent civilian lays it down that "by the Law of Nations a ship carrying contraband goods forfeits itself only and the said goods contraband, but not any other goods besides, that are not contraband." It seems however that under the modern practice of the British Prize Courts, as stated by Lord Stowell, a milder rule has been adopted, and the carrying of contraband articles is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant circumstances[18]. The milder rule dates from the early part of the eighteenth century, as

[17] Pratt on Contraband of War, p. 255.

[18] Bynkershoek strongly vindicates the strictness of the ancient law: "Publicabam quoque naves amicas, si scientibus dominis contrabanda ad hostes deferrent; et nisi pacta impediant, omnino publicandæ sunt, quia earum domini operantur rei illicitæ." Quæst. Juris Publici, L. I. c. 1. Grotius and Loccenius distinguish the case, in which the owner of the ship is privy to the contraband cargo, and in such case hold that the ship is forfeited; but where the contraband nature of the cargo is unknown to the

we find an exception introduced into the twenty-sixth article of the Treaty concluded between France and Great Britain at Utrecht in 1713, in favour of the ship itself as well as of the other goods found therein, which were to be esteemed free and not confiscated as lawful prize, notwithstanding that part of the cargo should consist of goods declared by that treaty to be contraband, and accordingly liable to be confiscated. In order however to exempt the ship from confiscation, the most perfect good faith must be shown upon the part of the owner of the ship and the master as his agent, for false papers setting up a pretended neutral destination will work a forfeiture of the ship[19], as well as of the cargo. So if the trade be in breach of any specific Treaty-engagements, as for instance when a Danish ship was carrying tar to an enemy's port, contrary to the Treaty-engagements between Great Britain and Denmark[20]. So if an attempt is made by the master to conceal any contraband cargo on board by fictitious bills of lading, the ship will be condemned with such portions of the cargo[21]. Contraband articles will also affect innocent parts of the cargo when they both belong to the same owners[22], and contraband articles, appearing by the ship's papers to belong to a part-owner of the ship, have been held to affect his share of the vessel[23]. According to the practice of the French Prize Courts, if the contraband portion of the cargo compose three quarters of the entire cargo,

owner of the ship, the forfeiture of the ship should not follow the condemnation of the cargo.

[19] The Sarah Christina, 1 Ch. Rob. p. 238. The Franklin, 3 Ch. Rob. p. 221. The Edward, 4 Ch. Rob. p. 68. The Ranger, 6 Ch. Rob. p. 126.

[20] The Neutralitet, 3 Ch. Rob. p. 296.

[21] The Richmond, 5 Ch. Rob. p. 325.

[22] The Stadt Embden, 1 Ch. Rob. p. 27.

[23] The Jonge Thomas, 1 Ch. Rob. p. 329.

the ship will be confiscated, together with the entire cargo[24]. The carrying of a contraband cargo is held under all circumstances by English Prize Courts to work a forfeiture of the freight[25]. This is a rule recognised by Bynkershoek[26], and the Courts of the United States of America[27] have adopted it. By the ancient law, as already observed, the ship, which had succeeded in carrying a contraband cargo to the enemy, was liable to be seized and confiscated on its return voyage. The severity of this law is still maintained in the case where the vessel has succeeded in carrying its contraband cargo to its destination by means of false papers, and the return cargo has been condemned together with the vessel, even in cases where the cargo has not been purchased with the proceeds of the contraband articles[28].

Treaty-engagements between Prussia and the United States of America.

§ 150. A somewhat singular innovation upon the practice, which has prevailed amongst the Nations of Europe in regard to Contraband of War, has been introduced into the Treaty-engagements between the United States of America and Prussia. The earliest Treaty-engagements between these two Powers on this subject occur in a Treaty of Amity and Commerce signed at the Hague on 10 Sept. 1785, and those engagements were renewed in a more complete manner in a subsequent Treaty signed on 11 July

[24] Règlement de 26 Juillet 1778, à l'egard des Navires des Etats neutres, qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés, et les dites marchandises seront saisies et confisquées; mais les bâtiments et le surplus de la cargaison seront relâchés, à moins que les dites marchandises de contrebande ne composent les trois quarts de la valeur du chargement; auquel cas les navires et la cargaison seront confisqués en entier. Traité des Prises Maritimes, par A. de Pistoye et Ch. Duverdy, Tom. I. p. 392.

[25] The Mercurius, 1 Ch. Rob. p. 288.

[26] Quæstiones Juris Publici, L. I. c. 10.

[27] The Commercen, 1 Wheaton, p. 382.

[28] The Nancy, 3 Ch. Rob. p. 122. The Margaret, 1 Acton, p. 336.

1799. By Article XIII of the latter Treaty it is provided as follows: "And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels or by the subjects or citizens of either party to the enemies of the other shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying however a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in a case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port nor further detained, and shall be allowed to proceed on her voyage. All cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartouch-boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel or passenger ought to have; and in general whatever is comprised under the denomination of

arms and military stores of what description soever, shall be deemed objects of Contraband." The provisions of this article have been renewed by the twelfth article of the Treaty of Commerce concluded between Prussia and the United States of America on 1 May 1828[29].

Belligerents may not interfere with Trade within the jurisdiction of a Neutral State.

§ 151. As the exercise of Belligerent Right can have no place within the territory of a Neutral State, a belligerent cannot interfere *jure belli* with any branch of trade, which is carried on within the jurisdiction of a Neutral State. Trade only becomes Contraband of War, when the merchandise is transported beyond the jurisdiction of a Neutral State, and is on its way to an enemy's ports, or to an enemy's ships upon the High Seas[30]. A Neutral Nation is not bound to prohibit its subjects from trading in any article whatsoever with merchants who frequent its ports, and who may be the subjects of belligerent Powers, for the sovereignty of a neutral Nation within its own territory is as absolute in regard to Nations which are at war with one another, as in regard to Nations which maintain relations of peace with one another. The duty of a neutral Nation, as such, towards belligerent Nations, is comprised in one word, *impartiality*. It is not the duty of a neutral Nation, as such, to undertake to prevent merchants, who frequent its ports, from carrying out of its jurisdiction the articles which they may have purchased,

[29] Martens, N. R. VII. p. 619. Preussens Staatsverträge, p. 852.

[30] The proclamation of King Charles I (anno 1625) is directed against any ships that shall sail with intention to pass to any of the King of Spain's countries or dominions, or to any of the King of Spain's ships, being on the sea. (Robinson's Collectanea Maritima, p. 59.) The majority of the Judges of the Supreme Court of the United States in the case of the Commercen, Wheaton, I. p. 382, were disposed to apply the principle of Contraband to merchandise, which was being carried to an enemy's army in a neutral country.

on the ground that those articles may be destined to the uses of a belligerent Power; it is the business of every belligerent Power to enforce its Rights of War, if it sees fit, on the High Seas, or within the enemy's territory. A neutral Nation may indeed bind itself by Treaty-engagements with a belligerent Nation not to allow any merchants to purchase within its jurisdiction certain articles, if they are to be carried to the ports of the adverse belligerent; but the observance of such Treaty-engagements will be inconsistent with neutrality, unless the neutral Nation should apply the same prohibition equally to all merchants intending to carry such articles to the ports of either belligerent. It is not however the practice of Nations to undertake to prohibit by their territorial laws merchants from purchasing in their ports those articles, which a belligerent Power may confiscate to its own uses *jure belli*, if it finds them on the High Seas, in the course of transport to the ports of his enemy, much less is it the practice of neutral Nations to confiscate such articles after purchase, whilst they are within its jurisdiction. A Belligerent alone has any right *jure belli* to take possession of that, which is the property of another person.

Mr. Webster, in a letter to Mr. Thompson, of July 8, 1842[31], has well observed, in his character of Secretary of Foreign Affairs to the President of the United States of America, that "the trade in articles contraband of war is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of Nations or particular Treaties. If it be true, therefore, that citizens of the United States have been engaged in

[31] Webster's Works, VI. p. 452, cited in the sixth edition of Wheaton's Elements, Part iv. c. 3. § 26. p. 571.

a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the Government of the United States, nevertheless, was not bound to prevent it, could not have prevented it without a manifest departure from the principles of neutrality, and is in no wise answerable for the consequences."

To the same effect Klüber has observed[32], "The practice of Nations received in Europe at the present day permits a commerce in time of war between neutrals and belligerents. It has only subjected it to certain restrictions with regard to the immediate necessities of war, and in respect of places under blockade. It does not forbid neutrals to sell to the Subjects of a belligerent Power articles which serve immediately to the uses of war, when the belligerents purchase the articles in the neutral country, and export them themselves. If, on the contrary, a neutral state or its subjects transport such articles to one of the belligerents, it is a violation of neutrality, and the merchandise is then styled 'Contraband of War.'"

A modern French naval writer, M. Ortolan[33], has to a similar purpose laid great stress upon the terms 'Commerce de transport,' as being that alone which is contraband or illicit. "A neutral state," he writes, "which permits its subjects to carry on a passive trade in such objects, that is, which allows the subjects of either belligerent indiscriminately to come and purchase articles in its markets, to be transported at their own cost and risk and in their own ships, does not violate its neutrality, nor can it be said to take part in the war because it allows free access to its ports, and maintains for all Nations the same

[32] Droit des Gens, § 288. Tom. II. L. III. c. 6. p. 158.
[33] Diplomatie de la Mer, Vattel, L. III. c. 7. § 111.

rights, which they had before war broke out, of coming to supply themselves in the way of commerce with the merchandise, of which they may have need; the neutral Nation cannot be responsible for the ultimate uses to which such articles may be applied, nor is it bound to know for whom they are bought, or what destination is reserved for them."

To a similar purport Chancellor Kent[34] has remarked, that "it was contended on the part of the French Nation, in 1796[35], that neutral governments were bound to restrain their subjects from selling or exporting articles Contraband of War to the belligerent Powers. But it was successfully shown by the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country[36].

[34] Kent's Commentaries, Tom. I. p. 142. Santissima Trinidad, 7 Wheaton, p. 783. Richardson *v.* Marine Insur. Company 6 Mass. Rep. 113.

[35] Mr. Adet's Letter to Mr. Pickering, 11 March 1796.

[36] The judgments of the Supreme Court of the United States had been anticipated by the opinion delivered by the Attorney-General of the United States on 20 January 1796, that "if the individual citizens of the United States carry on a contraband commerce with either of the belligerent Powers, neither can charge it upon the Government of the Neutral Nation as a departure from Neutrality, and that it is not considered as a duty imposed upon a Nation by a state of Neutrality to prevent its seamen from employing themselves in contraband trade; nor are there to be shown any instances where a Neutral Nation has exercised, or attempted to exercise, its authority in restraining practices or employments of this kind." Opinions of the Attorney-General of the United States, Vol. I. ed. 1852. p. 62.

CHAPTER VIII.

ENEMY CHARACTER.

Domicil the criterion of National Character for purposes of war —Permanent Residence constitutes Domicil—An acquired Domicil may be abandoned at the outset of war—The character of property is not always identical with the character of its owner—The enemy character may be engrafted *sub modo* on the neutral character—Distinction between enemies *de facto* and enemies *de jure*—Employment of neutral property in the service of a Belligerent State—The mercantile character is not affected by the consular character—The character of the produce of landed estates depends upon the character of the country, and not of the owners—Santa Cruz—City of Hamburg—Island of Corfu—Treaties of Cession—Louisiana—Treaty of Tilsit—The Seven Islands—The character of property cannot be changed *in transitu* on the High Seas—Exceptions in transactions of good faith, originating in time of peace—Enemy character may attach to places in the occupation of an enemy—Places in the occupation of an ally may be divested of the enemy character.

Domicil the criterion of National Character for purposes of war.

§ 152. WHEN a Sovereign Power is at war with another Sovereign Power, all the subjects *de facto* of the one Power are enemies *de jure* of the other Power, and the juridical obligations of amity, which exist between them as individuals, are suspended during the continuance of war. It does not however follow, according to the modern practice of Nations, that all the natural born subjects of a belligerent Power are enemies *de facto* of the other Power. It was the

ancient practice in formal Declarations of War for the Sovereign Power, which declared War, to require all its subjects to treat as enemies all the subjects of the Enemy-Power, in other words to require all persons who owed allegiance to it to treat, as enemies, all persons who owed allegiance to the Enemy-Power. But when the principle of Territorial Sovereignty came to be recognised by the Nations of Europe, as the basis for regulating their mutual relations as Nations, the character of an individual for international purposes came to be regarded from a territorial point of view, and personal allegiance ceased to be an absolute criterion of Enemy-Character. Under the feudal system individual men were bound, in virtue of their personal relations towards their Lord, to treat, as enemies, all who were enemies of their Lord. Under the theory however of Territorial Sovereignty the character of enemy-subjects is held to attach to the occupants of an enemy's territory, for all the occupants of the territory of a belligerent Sovereign are regarded as his subjects *de facto*, and are consequently enemies *de jure* of the other belligerent. Under this system of Public Law Domicil has become the criterion of National Character for purposes of war; and accordingly all natural born subjects of a belligerent Power, who may have abandoned their native country and acquired a domicil in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects, precisely as every natural born subject of a neutral Power will have clothed himself with the character of an Enemy-subject by long continued residence, coupled with the intention of remaining, in the Enemy's territory.

So strongly is the principle of Territorial Domicil interwoven with the administration of the Law of

Prize, that even as between a Sovereign Power and his natural born Subject the neutral Domicil of the latter may be set up in time of war as counterbalancing the principle of Natural Allegiance. Thus the Lords of Appeal held that a British born subject, resident in the English factory at Lisbon, so far possessed a Portuguese character, that his trade with Holland (then at war with England, but not with Portugal) was not impeachable as illegal trade[1]. On the same principle Lord Stowell held that a Natural born British Subject domiciled in the United States, who had estranged himself from his British character as far as his own volition and act could do, was not entitled to be regarded as a British subject, so as to come within the benefit of an order in Council directing the restitution of all vessels under the flag of the United States of America, which were *bonâ fide* and wholly the property of British subjects[2]. So likewise a person who was a natural born British subject, but had become a naturalised French subject, and whose property had been confiscated by the French Government, was held not to be within the provisions of a Treaty concluded between France and Great Britain, whereby compensation was given to British subjects[3]. On the other hand a foreigner, who was actually domiciled in Great Britain at the period of the confiscation of his property by the French Government, was held to be entitled to claim compensation for his losses under a Treaty providing such compensation for British subjects[4].

153. An essential difference exists between national

[1] The Danous, 17 March 1802, in a note to the Nayade, 4 Ch. Rob. p. 256.

[2] The Ann, 1 Dodson, p. 221.

[3] Sir William Grant's observation in the case of Devereux in a note to Drummond's case, 2 Knapp, p. 301.

[4] André's case, in a note to the Countess of Conway's case, 2 Knapp, p. 365.

character for municipal purposes, and national character for international purposes. Every independent State is competent to decide absolutely upon what conditions individuals shall enjoy the benefits of membership with it; and it may accord to persons born in foreign countries with more or fewer restrictions the same benefits which it accords to Natives, without reference to the consent of any other State. Accordingly the Right of Naturalising a natural born subject of another State is claimed and exercised by every independent Power without any regard to the municipal law of the particular State, within the territory of which the individual may have been born; but such Naturalisation does not necessarily determine the National Character of the individual for international purposes. It does not in the first place release the individual from his obligations of Natural Allegiance to the country of his Origin, for he can only be released from those obligations with the consent of the Sovereign to whom his allegiance is due; in other words the Naturalisation of an individual by a foreign State may operate to give to the party naturalised all the privileges of a natural born subject within the territory of the State itself, but it will be inoperative to dissolve his previous relations with the country of his Origin. Those relations indeed may be dissolved in such a case *ipso facto* under the provisions of the Municipal Law of the country of his Origin; but again the dissolution of those relations under that Law does not necessarily take effect beyond the territory, within which that Law is supreme. For instance, a third Nation might decree that the nationality of all foreigners coming within its jurisdiction shall be determined by their Origin, and by no other criterion whatsoever. Under such circum-

Permanent Residence constitutes Domicil.

stances a person who is by Origin an Austrian subject, and has been naturalised in France, and thereupon by the Law of France has acquired in France all the rights of a natural born subject of France, whilst by the Law of Austria he has lost in Austria all the rights of a natural born subject of Austria, might be adjudged by the Tribunals of a third Power to be clothed within its territory with an Austrian Nationality by reason of his Origin. Again, a Nation may have made no provision whatever under its Municipal Law for distinguishing the *status* of one foreigner from that of another foreigner within its territory; and such a system of Law may not be attended with any inconvenience in time of peace, but in time of war it becomes indispensable for every Nation to have some criterion to enable it readily to distinguish the character of an alien friend from that of an alien enemy. Nations have accordingly sought for a common rule in such matters, which would be free from ambiguity, whilst it should commend itself to universal acceptance by its natural justice; and Permanent Residence has been found to answer all the requirements of such a rule. An individual cannot be permanently resident in two countries; and wherever he is permanently resident, there he is contributing by his industry and general wealth to the strength of the country, and to its capacity to wage war. There can be therefore no injustice in regarding the property of such a person as forming part of the common stock of the Enemy Nation, upon which a belligerent may make reprisals. Thus Grotius[5] observes, "By the Law of Nations all the

[5] L. III. c. 2. § 7. Jure gentium subjacent pignorationi omnes subditi injuriam facientis, qui tales sunt ex causa permanente, sive indigenæ, sive advenæ: non qui transeundi, aut moræ exiguæ causa alicubi sunt.

subjects of the Sovereign, from whom an injury has been received, who are such from a permanent cause, are liable to reprisals, whether they be natives or immigrants, but not such persons as are only passing through his territory and sojourning in it for a short time." Accordingly we find, in the ordinary Declarations of Reprisals issued by Sovereign Powers, an express provision that the ships and goods of all persons inhabiting the territory of the adverse Power shall be subject to Reprisals [6]. The most recent order in Council issued by Great Britain on 29 March 1854 was to the like effect, "Her Majesty is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general Reprisals be granted against the ships, vessels, and goods, of the Emperor of All the Russias and of his subjects and *others inhabiting* within any of his countries, territories, or dominions."

An acquired domicil may be abandoned at the outset of war.

§ 154. Every inhabitant of an enemy's country is accordingly *primâ facie* an enemy, and his property may be seized by a belligerent, if found in any place where a belligerent may lawfully exercise the Rights of War. The burden of proof in such a case, that the merchant, whose property has been seized, is a natural born subject of a neutral Power, and of Right ought not to be treated by the belligerent Power as an enemy, falls upon the merchant. If he has acquired a Domicil in the enemy's country before war has commenced, and does not thereupon take immediately effective measures to abandon his acquired Domicil, he will be precluded by his Domicil from setting up his Neutral character of Origin. An actual return however to the country of his Origin is not always necessary, in order that such a person should divest himself of his Enemy-character nor

[6] The Postilion, Hay and Marriott, p. 245.

even an actual departure from the country of his adoption, if he has actually put himself in motion in good faith to quit the Enemy's country with the intention of abandoning his residence in it. Lord Stowell[7] has observed in regard to the national character of a natural born citizen of the United States of America, who by long residence in England had acquired under the Law of Nations the character of a British merchant at the commencement of hostilities between Great Britain and the United States, that "the character, that is gained by residence, ceases by residence. It is an adventitious character, which no longer adheres to him from the moment, that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." Accordingly, notwithstanding the owner of the ship Indian Chief had not quitted England at the time when his vessel sailed on an outward voyage from London, still as he had actually left England and was *in the act* of resuming his original American character at the time when his vessel was seized on her arrival at an English port for orders, the Prize Court held that her owner was to be considered as a neutral American citizen. So the Lords of Appeal[8] had previously held that a Natural born Subject of Great Britain, who had acquired a Dutch domicil by continued residence in Surinam and St. Eustatius, and had left those settlements with the intention of returning to Great Britain, but was still in Holland, the mother country of those settlements, when the order of Reprisals on the part of Great Britain against Holland was issued, was nevertheless entitled to the restitution of his property as a British subject, inasmuch as he was

[7] The Indian Chief, 3 Ch. Rob. p. 20.

[8] The Snelle Zeylder, Lords, 28 April 1783, reported in a note to the Indian Chief, 3 Ch. Rob. p. 21.

in itinere, had put himself in motion, and was in pursuit of his native British character. So likewise a British born subject who was domiciled in Holland at the commencement of hostilities with Great Britain, as partner in a house of trade at Flushing, and had immediately made arrangements for the dissolution of his partnership, and was only prevented from removing personally by the violent detention of all British subjects, who happened to be within the territory of the enemy at the breaking out of war, was held by Lord Stowell to be entitled to have his property restored to him as a British subject[9]. The same rule has been recognised in the Courts of the United States. "It is certainly true," observes Mr. Justice Story[10], "that a character acquired by residence ceases with the discontinuance of the residence. And therefore if a party, who has resided in an enemy country, puts himself *in itinere* to return to his native country with an intention of *bonâ fide* residence there, he is deemed already to have resumed his neutral character, although he has not arrived in such country. But until he has actually put himself *in itinere*, the character of the country where he resides adheres indissolubly to him. He takes it, with all its benefits and all its disadvantages."

The character of property is not always identical with the character of its owner.

§ 155. It has been sometimes said, that there is a peculiarity about Domicil in time of war, as distinguished from Domicil in time of peace; and that as a person may have establishments in two countries for commercial purposes, he may have in time of war for commercial purposes both a neutral Domicil and a belligerent Domicil. It is true, indeed, that the Municipal Law of a State may permit a citizen to

[9] The Ocean, 5 Ch. Rob. p. 91.

[10] The ship Frances and cargo, 2 Gallison, p. 616.

have two or more Domicils for Civil purposes; but Domicil for Municipal purposes means something different from and must be distinguished from Domicil for International purposes. An individual can only have one personal Domicil for international purposes in the sense in which Domicil is a criterion of a person being a friend or an enemy, for no person can be at the same time both a friend and an enemy under the Law of Nations; but an individual may be a belligerent *de facto*, notwithstanding that the Sovereign of the country, in which his property is situated, observes neutrality; and, on the other hand, his property may be engaged in the service of a belligerent Power, whilst he is himself resident in a neutral country, and does not personally take part in the war. The more philosophical view would rather seem to be that, which does not admit the Domicil of the owner to be conclusive of the immunity of his property in all cases from capture on the part of a belligerent, but only allows it to found a presumption of immunity, which may be rebutted by evidence that his property is *de facto* employed in the service of the enemy. "It is very clear," observes Mr. Justice Story [11], "that in general the national character of a person is to be decided by that of his Domicil: if that be neutral, he acquires the neutral character; if otherwise, he is affected by the enemy's character. But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. In other words, the origin of the property, or the traffic in which it is engaged, may stamp it with a hostile character, although the owner may happen to be domiciled in a neutral country. Such are the

[11] San Jose Indiano and cargo, 2 Gallison, p. 28.

familiar instances of engagements in the colonial, coasting, fishing, or other privileged trade of the enemy [12]. So the produce of an estate in an enemy's colony belonging to a person permanently resident in a neutral country, is impressed with the character of the soil, notwithstanding the character of the owner [13]. So if a vessel purchased in the enemy's country is by consent and habitual occupation employed in the trade of that country during the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicil of the owner [14]. The principle to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages as native resident subjects, his property *so employed* is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may; and the principle seems founded on reason. Such a trade so carried on has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It subserves his manufactures and industry, and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation in the same manner, as if the trade were pursued by native subjects. There is no reason therefore why he who thus enjoys the protection and benefits of the enemy's country, should not *in reference to such a trade* share its dangers and its losses. It would be too much to hold him entitled by a mere

[12] The Vigilantia, 1 Ch. Rob. p. 1. The Immanuel, 2 Ch. Rob. p. 148. The Anna Catherina, 4 Ch. Rob. p. 107. The Rendsborg, 4 Ch. Rob. p. 121. The Vrow Anna Catherina, 6 Ch. Rob. p. 161.

[13] The Dree Gebroeders, 4 Ch. Rob. p. 235. The Phœnix, 5 Ch. Rob. p. 20.

[14] The Vigilantia, 1 Ch. Rob. p. 12.

neutral residence to carry on a substantially hostile commerce, and at the same time possess all the advantages of a neutral traffic. "I agree therefore that it is a doctrine supported by strong principles of equity and propriety that there is a traffic which stamps a national character on the individual, independent of that national character which mere personal residence may give him [15]."

The enemy-character may be engrafted *sub modo* on the neutral character.

§ 156. The decisions of Prize Tribunals have sometimes proceeded upon the view that a belligerent character may be engrafted *sub modo* upon the neutral character of a merchant, without suspending altogether the latter. But this is only another form of embodying the principle that the neutral Domicil of the owner is not always conclusive of the neutral character of his property. When a merchant has commercial establishments in two countries, and it is necessary in time of peace to decide by what law the succession to his personal property is to be governed, the country, which is the seat of his principal establishment, is held to be the place of his Domicil. But Courts of Prize do not weigh the question of Domicil in the same accurate scales which are used by Courts, which administer the Law of Nations in time of Peace; and they have been accustomed to rule, that if a person has mercantile concerns in two countries, and acts as a merchant of both countries, he must be liable to be considered as a subject of either the one or the other, according as the particular transactions of his commerce have originated in one or other of the two countries [16]. Accordingly both the British and American Prize Courts have held that the same

[15] The case of Zacharie, Coopman and Co., before the Lords of Appeal, 9 April 1798, referred to by Lord Stowell in the Vigilantia, 6 Nov. 1798. 1 Ch. Rob. p. 15.

[16] The Jonge Classina, 5 Ch. Rob. p. 303.

person may have an enemy-character for certain purposes of commerce, combined with a neutral character for other purposes; and that his property, which is incorporated into the general trade of the enemy, may be condemned as enemy-property, whilst his property incorporated into the general trade of a neutral Nation, will not be liable to hostile confiscation. Thus it has been decided by the Supreme Court of the United States, that the property of a House of Trade, established in an Enemy's country, is condemnable as prize, notwithstanding the neutral Domicil of one or more of the partners[17]; and the High Court of Admiralty of England has held, that goods exported from an Enemy's country on behalf of a House of Trade, of which all the partners are domiciled subjects of a neutral Power, may be confiscated *jure belli*, if they have a permanent commercial agent in the Enemy's country to carry on a privileged trade of the Enemy[18]. The same principle seems to govern these cases, which founds the right of every belligerent to capture and confiscate the goods of a neutral merchant, which are being conveyed upon the High Seas to an Enemy's country, if such goods are of their own nature suitable to belligerent purposes, and which likewise founds the right of a belligerent to capture and confiscate the goods of a neutral merchant, of whatever nature they may be, which are being carried to an Enemy's port, which the belligerent has placed under blockade. In both of these latter cases it is obvious, that the commercial adventure, if it should be successful, will influence the conduct of the war in favour of the party to whom the supplies are being carried. Such

[17] The Friendschaft, 4 Wheaton, p. 107. The Antonia Johanna, 1 Wheaton, p. 168.

[18] The Anna Catherina, 4 Ch. Rob. p. 119.

an adventure is accordingly inconsistent with neutrality, and in such a case it is immaterial what may be the National character of the merchant, who has committed his property to an unneutral adventure. On an analogous principle, if a merchant domiciled in a neutral country does not take immediate measures at the commencement of war to withdraw his property from an unneutral trade, which he may have lawfully carried on in time of peace in the country of a belligerent, he cannot protect his property from hostile capture and confiscation, by alleging that he is personally resident in a neutral country. So likewise if the subject of a neutral Power, who is resident in an Enemy's country upon the outbreak of war, does not take immediate measures to withdraw his property from the Enemy's trade, so much of his property as continues to be employed in such trade will be liable to confiscation by the other belligerent, as being subservient to Enemy-interests. The trade of such a person is identical *de facto* with that of an enemy merchant; and it may be justly said of an enemy merchant, as contrasted with such a trader, *Quid ille fecit hostiliter, quod hic non faciat*[19]?

§ 157. The essential question to be determined in war in regard to the character of every person, is whether he is a friend or an enemy. National character furnishes a safe test of friendly or hostile character in most cases, and the presumption arising from it does not require to be supported by any evidence of the conduct of the party. But the presumption arising from national character fails altogether, if the party is in action, and his acts are at variance with the character of his Nation. A

Distinction between enemies *de facto* and enemies *de jure*.

[19] Bynkershoek, Quæst. Jur. Publ. L. I. c. 9.

belligerent has a natural right to treat as enemies, all who conduct themselves as such towards him; they are enemies *de facto*, and whilst they continue to be such, the juridical incidents of the Enemy character must be deemed to attach to them equally as to persons who are enemies *de jure*. But there is this difference between enemies *de facto* and enemies *de jure*, that the former are enemies *sub modo* only, and in reference to so much of their conduct as is hostile. If they cease to act as enemies, the foundation of their hostile character is gone. The practice of Nations in this respect allows equitable considerations to have weight in the question. It is in the interest of the belligerent himself that an enemy *de facto* should be distinguished in Law from an enemy *de jure*. Peace is restored in the case of an enemy *de facto* by the cessation of hostilities: in the latter case however there is a question of Right, which remains to be settled by conference after the suspension of arms. But the conduct of a party is that of an enemy *de facto*, if he supplies the necessities of a belligerent, and by so doing furthers his resistance to his adversary. Upon the field of battle the men who bring up supplies from the rear are sustaining the energies of those in the front ranks: so in the case of a besieged town those who carry in supplies to the Garrison are furthering its resistance to the besiegers. There is no distinction in principle between the conduct of such parties, and the conduct of the trader who carries supplies into a blockaded port. The undertaking is evidently for the immediate benefit of one belligerent, and for the direct disadvantage of the other belligerent, and is accordingly inconsistent with neutrality. To allow the property of the trader in such a case to be exempt from capture and condemnation,

on the grounds that he is resident in a neutral country, would be unreasonable, for it is precisely in virtue of such residence that he is able to assist the enemy, by supplying him with those necessaries which the enemy has not in his own country. The merchant however is only considered to be thus far impressed with the hostile character, as regards his unneutral trade. He is so far and no further an enemy *de facto*.

§ 158. The residence of a merchant in a neutral country is thus not always conclusive of the neutral character of his property in time of war. The use, to which an article is put, will in certain cases determine the right of a belligerent Power to seize and confiscate it, without any regard to the neutral character of the legal owner. For instance, if the subject of a neutral Power places an article, of which he is owner, at the absolute disposal of a belligerent Power for a certain time, the article in question becomes subject to capture and confiscation during such time, precisely as if it were enemy's property. To admit any other conclusion would be equivalent to allowing a belligerent to make war with borrowed weapons, and to preclude his adversary from seizing them and disarming him. It is immaterial in reference to the employment of the property of a neutral subject in the service of an Enemy State, whether such employment be voluntary or involuntary on the part of the owner. "If an act of force," observed Lord Stowell, "exercised by one belligerent on a neutral ship or person is to be deemed a sufficient justification for any act done by him contrary to the known duties of the neutral character, there would be an end of any prohibition under the Law of Nations to carry Contraband, or to engage in any other hostile act. If any loss is sustained in such

Employment of the property of a neutral subject in the service of a belligerent Power.

service, the neutral yielding to such demands must seek redress against the Government that has imposed the restraint upon him." Upon this principle Lord Stowell condemned as prize of war, a Swedish vessel[20], which had been employed by the French Government in transporting a troop of cavalry to Alexandria, notwithstanding the Master alleged that he was acting under duress. The conveyance of enemy-soldiers to a neutral country is distinguishable from the conveyance of enemy-soldiers to an enemy's country. If a vessel[21] belonging to the subjects of a Neutral Power is engaged in conveying military persons in the service of the enemy to an enemy's colony, such a trade will subject the vessel captured to confiscation, notwithstanding that the Master of the ship may have been deceived in respect of the military character of his passengers, and however few may be the number of them; although on the other hand the carrying persons in the military service of the enemy to a neutral country, as passengers in the ordinary course of trade, will not enure to the confiscation of the ship, if she be owned by the subjects of a neutral Power. Thus in the case of the Henric and Alida[22], which was a Dutch ship bound from a Dutch port to St. Eustatius, a Dutch Colony, with powder, guns, and naval stores on board, and five military officers in the enemy's service embarked as ordinary passengers, Sir George Hay directed the ship and cargo to be restored to the Dutch owners, Holland being at such time a Neutral Power.

It would be otherwise, however, if a neutral-owned vessel should have been hired by the agents of a

[20] The Carolina, 4 Ch. Rob. p. 436.
p. 261.
[21] The Orozembo, 6 Ch. Rob.
[22] 1 Hay and Marriott's Reports, p. 139

belligerent Government so as to be entirely at its disposal for the purpose of carrying soldiers or stores in the service of the State. It will signify nothing under such circumstances whether or not the troops or stores conveyed are to be applied immediately to hostile purposes, when they arrive at their destination. For instance, if Great Britain should be engaged in a war with Russia, and the British Government should charter a neutral vessel to transport a British regiment of infantry to Alexandria, the Sultan of the Ottomans, being at such time at peace with both the belligerent Powers, might consistently with neutrality allow a passage through a province of the Ottoman Empire to the troops of Great Britain. It is obvious however that the immediate destination of the vessel to a neutral port would not relieve such a traffic on the part of the shipowner from its hostile character. The actual conveyance of troops, either for present or for future use, is what constitutes the object and employment of transport-vessels; and it is a distinction totally unimportant, whether the transport of enemy-troops may be connected with immediate action in the service of the enemy or not[23]. So likewise the transport, coupled with the concealment, of *public despatches* addressed from the Governor of an enemy's colony to the Government of the mother country in charge of an officer of high rank, as a passenger on board of a neutral vessel, although the voyage of such vessel was to end in a neutral port, was held to be inconsistent with the neutral character, and to be an aggravated case of active interposition in the service of the enemy[24]. Other cases of trade in the service of the enemy may be enumerated, in which a neutral

[23] The Friendship, 6 Ch. Rob. p. 427.

[24] The Atalanta, 6 Ch. Rob. p. 460.

shipowner cannot with good faith and without forfeiture of his neutral character engage his vessel. Thus if a vessel is owned by the subject of a neutral Power which is under treaty-engagements with a belligerent Power not to carry goods of a particular nature for the use of its enemies, the employment of such a vessel in carrying such commodities will work its forfeiture, if it be captured by the belligerent Power[25]. So again a vessel neutral owned but sailing under an enemy's license[26] or under enemy's convoy[27], renders itself thereby liable to capture by the adverse belligerent.

The Mercantile character is not affected by the Consular character.

§ 159. The national character of the Political agent of a neutral State, who is resident in a belligerent country, is not affected by such residence, whatever may have been the duration of such residence; but it is otherwise with a Commercial agent. A Consul does not participate in the privilege of exterritoriality, which a Political Envoy enjoys; and if he is personally engaged in the commerce of a belligerent country, his Consular character affords no protection to his mercantile adventures. "It is a point fully established in these Courts," says Lord Stowell[28], "that the character of Consul does not protect that of Merchant united in the same person. It was so decided in solemn argument in the course of the last war by the Lords, in the cases of Mr. Gildermester, the Portuguese Consul in Holland, and of Mr. Eykellenburg, Prussian Consul at Flushing[29]. These cases were again brought forward to notice in the case of Mr. Fenwick, American Consul at Bourdeaux,

[25] The Neutralitet, 3 Ch. Rob. p. 296.

[26] The Julia, 8 Cranch, p. 189.

[27] The Nereid, 9 Cranch, p. 388.

[28] The Indian Chief, 3 Ch. Rob. p. 27.

[29] Concordia, Lords, 5 Feb. 1782. The Het Huys, Lords, 16 July 1784. The Pigou, Lords, 18 July 1797.

in the beginning of this war, on whose behalf a distinction was set up in favour of American Consuls, as being persons not usually appointed, as the Consuls of other nations are, from among the resident merchants of the foreign country, but specially delegated from America, and sent to Europe on the particular Mission, and continuing in Europe principally in a mere Consular character. But in that case, as well as in the case of Sylvanus Bourne[30], American Consul at Amsterdam, where the same distinction was attempted, it was held, that if an American Consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than existed in the case of any other Consul. The moment he engaged in trade, the pretended ground of any such distinction ceased; the whole of that question therefore is as much shut up and concluded as any question of law can be." On the other hand the subject of a neutral Power, who carries on trade within the territory of the neutral Power, does not forfeit his neutral character by acting as Consul of a belligerent Power. "If the cargo," says Lord Stowell[31] in the case of a Swedish ship laden with tar, pitch, iron, hoops, and bars, and bound ostensibly for the neutral port of Cagliari, "had been really going to Cagliari, although it was the property of Mr. Koch, the French Consul, yet being as to his mercantile character a trader of Uddevalla, and his mercantile character being unaffected by his consular character, he would have a clear right to trade to the same extent as any other merchant of that place, and consequently to carry pitch and tar to a neutral port."

[30] The Orion, Admiralty Court, 24 March 1797.

[31] The Sarah Christina, 1 Ch. Rob. p. 238.

The Character of the produce of land varies with the character of the country and not of the owners.

§ 160. Although the possession of landed estates in a belligerent country will not deprive a merchant, who is a domiciled subject of a neutral Power, of his personal neutral character, still the neutral character of the owner will not protect his property, which is in the course of transport from the belligerent country as the immediate produce of his landed estates, from belligerent capture[32]. "The produce of a person's own plantation," says Lord Stowell[33], "in the colony of the enemy, though shipped in time of peace, is liable to be condemned as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the Nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal relations and occupation." It would appear from this decision that the breaking out of war subsequently to the shipment of the goods was sufficient to impress upon them an Enemy-character at the time of their capture. So if the character of a country be varied under the operations of war, if it passes by conquest out of the possession of one Power into the possession of another Power, the produce of the soil shipped after the conquest will vary in respect of its neutral or Enemy character according to the character of the conquerors. Thus the island of Santa Cruz, a possession of the Crown of Denmark, was captured by the British forces. Mr. Bentzon, who was a proprietor of land in the island, and at the same time an officer of the Danish Government, withdrew from the island after its surrender, and took up his residence in Denmark. The

Santa Cruz.

[32] The Dree Gebroeders, 4 Ch. Rob. p. 233. 5 Ch. Rob. p. 168. The Phœnix, 5 Ch. Rob. p. 20.

[33] The Vrow Anna Catherina,

property of the inhabitants not being disturbed by the conquerors, Mr. Bentzon still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of the estate, on board a British ship to a commercial house in London, at the risk of Mr. Bentzon. On her passage the ship was captured by an American privateer, and her cargo was condemned in a Prize Court of the United States, as British property[34]. "Some doubt," observed Chief-Justice Marshall, "has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during War are not considered as permanent, until confirmed by Treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz after its capitulation remained a British island, until it was restored to Denmark." In this case all the power of the Civil Government had been absorbed by the conqueror, and the occupation of the island was politically complete. On the other hand, if a Neutral Country be in the military possession of a belligerent Power, but maintains her own civil Government *proprio jure*, the latter circumstance has been held sufficient to prevent the Country being considered as a conquered Country. Such was the purport of a decision in an English Court of Common Law in regard to the property of merchants resident in the City of Hamburg, which was at such time in the military occupation of French troops, whilst all the powers of civil government were administered in the same manner as they

City of Hamburg.

[34] Thirty Hogsheads of Sugar *v.* Bentzon, 9 Cranch, p. 191.

had formerly been before the arrival of the French. In this case, which came on before the Court of King's Bench at Westminster and involved a question of Maritime Insurance, the Court held, that as Great Britain had by an order in Council permitted the inhabitants of Hamburg to continue their commerce with Great Britain, notwithstanding the Military occupation of the City of Hamburg by French troops, the inhabitants of Hamburg were to be considered as retaining their character of neutral merchants. To a similar purport in reference to the island of Corfu, in which, together with the other islands of the Ionian Republic, Russia had for four or five years maintained itself in military occupation, but during such time the flag of the Ionian Republic was displayed from the forts of the island, an Admiral appointed by the Ionian Republic presided over the port, a Consul from the Supreme Porte resided at Corfu, and an English Consul was recognised by the Prince and Senate of the Ionian Republic, Lord Ellenborough[35] refused to recognise the island as part of the Russian territory, or its inhabitants as co-belligerents with the Russians against the Ottoman Porte. "It is impossible," he observed, "to say that the Government of the Ionian Republic (which had been recognised at the peace of Amiens as an independent State) was superseded at a time, when its institutions subsisted and its supremacy was recognised[36]."

Island of Corfu.

Treaties of Cession.

§ 161. With regard to a country which has been ceded under Treaty by a neutral Power to an enemy Power, the signature of the Treaty is not sufficient to impress an enemy character on the country and its inhabitants. Actual delivery into the possession of

[35] Hagerdon *v.* Bell, 1 Maule and Selwyn, p. 462.

[36] Donaldson *v.* Thompson, 1 Campbell, p. 438.

the enemy is required to give complete effect to the Cession. This question was considered by Lord Stowell[37] in a case where property was captured in the month of May 1803, in a voyage from the port of New Orleans to Havre de Grace, and was claimed on behalf of a merchant resident in New Orleans. Louisiana had been ceded by Spain to France under the treaty of San Ildefonso in 1796, but France had not actually taken possession of the country at the time when the property was captured. Lord Stowell held that as it was a principle of jurisprudence, that the actual possession of a thing must be united to the right of taking possession before the Right of Property is complete, and as the practice of Nations had been in conformity with this principle, the country of Louisiana and its inhabitants continued to be under the dominion of Spain, until possession should have been actually taken by France. Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of Cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding has become almost a matter of necessity with regard to the colonial establishments of the States of Europe in the New World. The Treaties by which they are effected may not be known to them for months after they are made. Many articles must remain executory only, and not executed, until carried into effect; and until that is done by some public act, the former sovereignty must remain. On the other hand, if a country has been delivered over voluntarily by one Power to another Power, which is in actual possession of it,

Louisiana.

[37] The Fama, 5 Ch. Rob. p. 113.

although there may be no evidence forthcoming of a formal Treaty of Cession, the act of voluntary delivery will establish a legal presumption of a voluntary surrender of all title. Thus Russia had delivered up possession of the Seven Islands to France, and part of the French troops had been conveyed thither on board of and under the protection of Russian ships. No Treaty of Cession had been publicly announced, but France and Russia had settled their differences by the Treaty of Tilsit, and, the two countries being at peace with one another, there could be no doubt that the surrender of the Seven Islands to France had been a voluntary act on the part of Russia. Under these circumstances Lord Stowell held that "the voluntary surrender of the islands on the part of Russia was an actual transfer to France, and consequently that the inhabitants of the islands had become French subjects." A cargo therefore which had been shipped on board a Danish ship, bound from Zante to Copenhagen, and which was documented as the property of merchants resident in the Seven Islands, and which had been captured by an English privateer after the Seven Islands had passed into the possession of France, was condemned as belonging to the subjects of France at the time of capture[38].

Treaty of Tilsit.

The Ionian Islands.

The character of property cannot be changed *in transitu* on the high seas.

§ 162. There is a settled rule of the Prize Courts of Great Britain and the United States, that property cannot be divested of its enemy-character *in transitu* on the High Seas, and that all property which has a hostile character impressed upon it at the inception of a voyage, remains liable to capture until its arrival at its destination[39]. Thus a ship

[38] The Bolletta, Edwards, p. 173.

[39] The ship Frances and cargo, 1 Gallison, p. 448, S. C. 8 Cranch, p. 354. The Vrow Margaretha, 1 Ch. Rob. p. 339.

was captured by a British cruiser on a voyage from Batavia to Holland. She was the property of merchants resident at the Cape of Good Hope, who were enemy-subjects at the time when the vessel sailed by reason of the Cape of Good Hope being at such time a Dutch settlement. During the voyage, and before the vessel was captured, the Cape of Good Hope had capitulated to the British forces, and the inhabitants had become British subjects. The ship however was condemned by Lord Stowell [40], as retaining its Dutch character, upon the authority of a decision of the Lords of Appeal in De Negotie en Zeevaart (18 July 1782). "I remember," observes Lord Stowell, "a *dictum* of a great Law Lord then present, Lord Camden, that 'the ship sailed as a Dutch ship, and could not change her character *in transitu*.'" The case of De Negotie en Zeevaart, on which Lord Stowell thus relied, is an important decision upon another point. It was the case of a Dutch ship which sailed from Demerara to Middleburg, in Holland, on 30 January 1781, about six weeks after the declaration of war on the part of Great Britain against Holland. Demerara subsequently surrendered to the British forces on 14 March, and the vessel was captured on 25 March. The terms of the Capitulation had been very favourable, and it had been announced by a Proclamation of the Commander of the British naval forces, that the inhabitants were "to be permitted to export their own property, and to be treated in all respects like British subjects, until his Majesty's pleasure should be known." Under the terms of this Proclamation several claims were given in to the High Court of Admiralty of England for portions of the cargo on board De Negotie en

[40] The Danckebaar Africaan, 1 Ch. Rob. p. 112.

Zeevaart, as being the property of inhabitants of Demerara described in such claims as British subjects. Sir James Marriott, the Judge of the High Court of Admiralty, had condemned the ship on 26 May 1781 and the master's adventure, as Dutch property, no claim having been given for them; but the claims for portions of the cargo, as the property of British subjects, stood over for argument, and came on before the Court on 23 February 1782, when Sir James Marriott decreed such portions to be restored to the claimants in their character of British subjects. From this decree the captors appealed, and the appeal came on for hearing before the Lords Commissioners of Appeal on 18 July 1782. On this occasion Lord Camden, the Lord President of the Council, said that "a General or Admiral taking a settlement or an island by Capitulation may by a Proclamation or otherwise grant to the owners the property actually taken; but he cannot protect from capture the property of the Capitulants at that time at sea, or out of the territory so taken." Their Lordships accordingly reversed the sentence of the Judge of the High Court of Admiralty, and condemned the cargo[41] taken on board De Negotie en Zeevaart, as good prize.

Exception in transactions of good faith originating in time of peace.

§ 163. There is an exception however to the rule that property cannot be transferred *in transitu* on the High Seas, so as to acquire the national character of a neutral purchaser. A merchant of Hamburg entered into a contract with two Spanish houses for some wines, which were shipped from a Spanish port before the commencement of hostilities between Spain and Great Britain. If the transaction had originated in time of war, as it was admitted that the

[41] MS. Report of the judgment of the Lords of Appeal in De Negotie en Zeevaart, which is in possession of the author.

wines were shipped as Spanish property they would have retained their Spanish character according to the rule of the Prize Court, until they had been delivered at their port of destination. "If such a rule did not exist," observed Lord Stowell, "all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. It is on this principle held, I believe, as a general rule, that property cannot be transferred *in transitu*, and in that sense I recognise it as the rule of this Court. But this arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in time of peace. The transfer, therefore, must be considered as not invalid in point of law at the time of the contract, and, being made before the war, it must be judged according to the ordinary rules of commerce[42]." In the above case Lord Stowell held that the commercial transaction was of a *bonâ fide* character, not made in contemplation of a war with any intention of defrauding the belligerent of his right to capture the goods of his enemy. So likewise in consideration of the fair course of mercantile speculation in time of peace, the same learned judge allowed a transfer of title to goods *in transitu* to be effected by the transfer of the bills of lading, when it had been done without any view of accommodation to relieve the seller from the pressure or prospect of war. But if the contemplation of war leads immediately to the transfer and becomes the foundation of a contract, which would not otherwise have been entered into on the part of the seller, and this is known to be so done in the understanding of the purchaser, though on his side there may be other concurrent motives, as

[42] The Vrow Margaretha, 1 Ch. Rob. p. 337. The Packet de Bilboa, 2 Ch. Rob. p. 133.

in the case of the Rendsborg [43], such a contract cannot be held good on the same principle that applies to invalidate a transfer *in transitu* in time of actual war [44]. "The nature of both contracts is identically the same, being equally to protect the property from capture of war, not indeed in either case from capture at the present moment, when the contract is made, but from the danger of capture, when it is likely to occur. The object is the same in both instances, to afford a guaranty against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule."

Enemy character may attach to places in the occupation of an enemy.

§ 164. Although the occupation of a territory by a military force is usually regarded as provisional, and is not held to change the national character of its *inhabitants*, until it has been confirmed by some formal act of Cession, or by Possession for a considerable lapse of time, yet an enemy-character may be impressed upon a place for commercial purposes by the temporary occupation of it by an enemy's army. The prohibition of all intercourse with the enemy applies not only to places which are normally and rightfully subject to the enemy, but to every place which is in the actual possession of the enemy, although the possession of it be so purely military and temporary, as not to have affected the national character of its inhabitants. The same considerations, which forbid intercourse with the enemy, apply to the ports of an allied or friendly Power, which are in the temporary occupation of the enemy, equally as to those which are under his permanent dominion.

[43] The Rendsborg, 4 Ch. Rob. p. 121.
[44] The Jan Frederick, 5 Ch. Rob. p. 133.

There is the same mischief likely to accrue to the belligerent Sovereign from such intercourse, and consequently the same breach of duty on the part of a neutral or a subject, if he should attempt to hold any such intercourse. Accordingly we find that in the British Order in Council of 15 April 1854, whereby Neutrals and British Subjects were permitted to transport enemy's property on board their vessels without fear of its capture, unless it should be Contraband of War, an express exception was made in respect of the destination of such cargoes on board of English vessels to ports in the *possession* of an enemy, namely, "that the British vessel should not under any circumstances whatsoever, either under or by virtue of this Order or otherwise, be permitted or empowered to enter or communicate with any port or place, which shall belong to or be in the possession or occupation of her Majesty's enemies."

Friendly character may attach to places in the occupation of an ally.

§ 165. On the other hand it is competent for a belligerent State to recognise the suspension *de facto* of the authority of an enemy over a province or colony, which has successfully revolted from the ruling or parent State. Thus the inhabitants of several portions of the island of St. Domingo had revolted against the Empire of France, at such time engaged in war with Great Britain, and the insurgent negroes, who were in actual occupation of those portions of the island, had detached them from the authority of France, and maintained, within those portions at least, an independent government of their own. Under such circumstances a British Order in Council was issued, permitting "British vessels to go to such ports and places in the island of St. Domingo as are not or shall not be under the dominion, and in the actual possession of his

Majesty's enemies." Lord Stowell, in construing this Order, held that the legal meaning of 'dominion' implies rightful possession and authority; as applied to private property it signifies not merely possession, but possession with rights of property, that of which the person is *dominus*; and as applied to public possession, it is the right of legal authority. Accordingly as the British Government had declared there were parts of the island, which were neither in the possession nor in the dominion of France, trade with such parts would be innocent. "It is not necessary," he observed, "that this declaration should amount to a perpetual recognition of the independence of those places, as in the case of a formal and permanent Cession. It is sufficient that there is a rightful and acknowledged suspension of the authority of France, that will of itself exempt the parties from the penalty of trading from an enemy's colony[45]." It is however not for the Prize tribunals, but for the Executive Government of a Nation, to decide, when the inhabitants of a revolted territory are entitled to be recognised as an independent Nation. Until that decision has been made, Courts administering the law of Nations are bound to regard the Sovereignty of the ruling or Mother State to be still subsisting of Right.

[45] The Manilla, Edwards, p. 5. Johnson *v.* Greaves, 2 Taunton, p. 344. Blackburn *v.* Thompson, 15 East, p. 81. Rose *v.* Himely, 4 Cranch, p. 272.

CHAPTER IX.

ON CAPTURE AND ITS INCIDENTS.

Duty of Captors to bring in their captures for adjudication as Prize—Enemies have no *locus standi* in a Prize Court—What is essential to constitute capture—Forms of proceeding in Great Britain to constitute Prize Courts—Jurisdiction of Courts to distribute Prize—Absolute Control of the Crown over all captures—Recapture subject to the *jus postliminii*—Rule of twenty-four hours' possession—Salvage on Recapture—Practice of Great Britain and of the United States of America—Practice of France, Spain, Denmark, Sweden, and Holland—Insurable interest of British captors—Ancient practice as to prisoners of war—Modern Cartels for the exchange of prisoners—Cartel Ships—Ransom of Captures at Sea—Ransom Bills—Hostages—Modern Restraints upon Ransom—Joint Captures—Distribution of Prize amongst joint Captors—Condemnation of Prizes brought into the port of an ally.

Duty of Captors to bring in their captures for adjudication as Prize.

§ 166. THE object of captures at sea having been originally to make Reprisals *ad damni dati modum*, and the right to make Reprisals ceasing upon sufficient security (pignoratio) having been taken to make good the damage, for which Letters of Reprisals had been granted by the Sovereign Power, it was an usual condition of Letters of Marque and Reprisals that the captures should be brought into port and submitted to the adjudication of a competent Court, in order that the validity of each capture should be determined, and permission be granted or refused to the captor to convert the property to his own use. Hence very different rules have been established in

regard to maritime captures from those which are applicable to captures on land. The nature of hostilities, which are carried on within an enemy's territory, requires that an invading army should not encumber itself with booty; and accordingly the Commander of an army carries with him authority to make immediate enquiry, and to determine summarily all questions of title to booty.

In very early times the Admiral of a fleet of armed cruisers determined in like manner the question of Prize or no Prize summarily, or, as it was said, *velis levatis*. The capturing vessel conducted its capture to the Admiral-Ship, upon the deck of which enquiry was made by inspecting the papers of the captured vessel and interrogating her master and crew, and thereupon the vessel and her cargo were adjudged to be good prize, or were forthwith allowed to pursue their voyage. Under the present practice of warfare upon the High Seas, it is the duty of the captors to send their captures to a convenient port of their own country or of an allied country, and to submit them immediately for enquiry and adjudication before a lawfully constituted Prize Court. If the captors should fail to do this, it is competent for the party who claims the ship and cargo to apply to a Prize Court of the captors' country for a Monition against the captors to proceed forthwith to adjudication; in which case if the captors should neglect to appear and proceed to adjudication, the Court may condemn them to make restitution with costs, and sometimes with damages. It is immaterial in such a case whether the captors have acted in good faith or not in making the capture. "If the captor," observes Lord Stowell[1], "has been guilty of no wilful misconduct, but has acted from

[1] The Actæon, 2 Dodson, p. 52.

error or mistake only, the suffering party is still entitled to full compensation, provided he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the person, to whom the property belonged, must not be a sufferer. As to *him* it is an injury, for which he is entitled to redress from the party who has inflicted it upon him; and if the captor has by the act of destruction conferred a benefit upon the public, he must look to the Government for his indemnity. The loss must not be permitted to fall upon the innocent sufferer."

§ 167. The personal obligation of a captor to bring his captures into port for enquiry and adjudication is founded upon the instructions, which he has received from the Government, which has authorised him to make captures. The obligation of every Government on the other hand to require its cruisers to bring their captures into port for adjudication before a competent Court of Prize rests upon the general Law of Nations. But this obligation under the common Law of Nations exists only with respect to vessels navigated under a Neutral flag, the object of the enquiry before a competent Court being to ascertain whether the captured property in each case belongs to a neutral or an enemy, and to restore the property if it belongs to a neutral, and so to restrain the captor in the eager pursuit of gain from doing injustice to innocent merchants, whereby national quarrels might arise. Enemies on the other hand have no *locus standi* in a Prize Court under the general Law of Nations, and they cannot claim of Right that their property upon capture by a belligerent cruiser should be taken into a port of the belligerent or of his ally for enquiry and adjudication.

Enemies have no *locus standi* in a Prize Court.

Capture of itself divests an enemy of his property *jure belli*. Upon the surrender of a vessel under an enemy's flag on the High Seas, a belligerent may destroy her under the general Law of Nations; and if the captor is unable to bring her into port, he will be justified towards his own Government in destroying her. The instruction of his own Government may indeed require him to bring into port every capture which he may make, but he may be actually engaged in a service, which will not allow him to put a prize crew on board the vessel which he has captured, in order that she may be taken into port. Under such a collision of duties, Lord Stowell has held that nothing is left to the belligerent vessel but to destroy the enemy vessel which she has taken; for she cannot consistently with her general duty to her own country, or indeed under its express injunctions, permit enemy's property to sail away unmolested. If it should be impossible to bring in, her next duty is to destroy enemy's property. When it is doubtful whether it is enemy's property, and it is impossible to bring it in, no such obligation arises, and the safe and proper course is to dismiss. When it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the captor's own State. To the neutral it can only be justified, under any such circumstances, by a full restitution in value[2].

What is essential to constitute a capture.

§ 168. In order to constitute a capture at sea, an act of taking possession is not absolutely necessary: the state of the weather alone may be such that the captor cannot safely take possession of the enemy's vessel, and yet he cannot with humanity continue hostilities, after the master and crew have signified

[2] The Felicity, 2 Dodson, p. 386.

their intention not to resist. The real surrender of the vessel is therefore held to take place when she lowers her flag. But there must be an intention manifested by the captor to make prize of the vessel, which has surrendered, by some act beyond that of compelling it to surrender, otherwise the capture will be regarded as abandoned by him in such a sense, that it may enure to the benefit of another party, who subsequently takes possession of the enemy's vessel. It is therefore the general rule for the commander of the vessel, which has made a capture at sea, to put a prize-master on board the captured vessel; but many captures have been held effectual where no man has been even put on board, but the ship only has been compelled to steer in the direction prescribed by the captor[3]. Lord Stowell has observed that "if a merchant vessel is obliged to lie to and obey the orders of the enemy-vessel, she is completely under the dominion of the enemy; and that if a captured vessel remains under the coercion of the guns of the captor, she is as much in his possession, as if the men, who were otherwise to work those guns, had been put on board." On the other hand it is a sufficient act of taking possession of a vessel, if a single man is put on board by the captors as prize-master. It is usual to put a prize-crew on board of sufficient strength to prevent any chance of a successful attempt to rescue the vessel; and sometimes a part of the crew of the captured vessel are taken out of her as a measure of precaution against their attempting to overpower the prize-crew; but it is competent for a captor, if he places confidence in the promise of the master of a captured vessel, to retain the possession of the prize as against all sub-

[3] The Hercules, 2 Dodson, p. 368. The Edward and Mary, 3 Ch. Rob. p. 306.

sequent captors by placing a single man on board of her. "It is clear," says Mr. Justice Washington[4] in delivering the judgment of the Supreme Court of the United States, "that some act should be done indicative of an intention to seize and retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor." Accordingly it was held by the Supreme Court that the presence of a single man on board, although he did not interfere with the navigation of the ship, has been sufficient to retain possession of a prize on behalf of the captor. Lord Stowell, to a similar purport, held that the presence of two men on board, although they had not taken possession of the ship's papers nor had interfered with the navigation of the vessel, was sufficient to retain possession of a prize in favour of the first captor against a privateer, which had seized the vessel a second time and put one man on board of her, as well as against a King's ship which had subsequently assisted to prevent the master of the captured vessel from carrying into effect his intention to take his vessel into an enemy's port. Upon the ground of the latter act of assistance the commander and crew of the King's ship attempted to maintain a title of capture, but the Court held that the assistance which they had afforded was only sufficient to found an interest on their behalf in the nature of a claim for military salvage, and decreed them only a salvage remuneration[5].

Forms of proceeding in Great Britain to constitute Prize Courts.

§ 169. The right to all captures is vested in the Sovereign Power, which has granted to the Commander of an armed ship a Commission to make capture of enemy's property; but the capture of

[4] The Grotius, 9 Cranch, p. 370.

[5] The Resolution, 6 Ch. Rob. p. 23.

such property may enure to the benefit of the actual captor by a grant from the Sovereign Power, and under such limitations and conditions as it may be pleased to impose. In Great Britain it is usual at the outset of war for the crown to issue in the first place an order in Council[6], granting General Reprisals "against the ships, vessels, and goods of the Enemy Sovereign and of his subjects and others inhabiting within any of his countries, territories, or dominions," so that her Majesty's Fleets and Ships may lawfully seize them and "bring the same to judgment in such Courts of Admiralty within her Majesty's dominions, possessions, or colonies, as shall be duly commissionated to take cognisance thereof." The Crown thereupon issues a Commission under the Great Seal (which is prepared by Her Majesty's Advocate General and Her Majesty's Advocate in her Office of Admiralty) addressed to the Lord High Admiral, or the Commissioners for executing his office, authorising him or them to require the High Court of Admiralty of England and the Lieutenant or Judge thereof, as also the several Courts of Admiralty within her Majesty's dominions, which shall be duly commissionated, to take cognisance of and judicially proceed against all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same, and according to the course of the Admiralty and the Law of Nations to adjudge and condemn all ships, vessels, and goods as shall belong to the Enemy Sovereign, or his subjects, or others inhabiting within any of his countries, territories, or dominions. Instructions are subsequently prepared by the same Law Officers, and are issued to the several Courts of Admiralty within her Majesty's

[6] Order in Council of 29 March 1854.

dominions for their guidance. Under the authority of the Commission issued pursuant to such Order in Council, the Lord High Admiral or the Commissioners for executing his office issue a Warrant to the Judge of the High Court of Admiralty, who is thereby authorised to adjudicate upon all captures, seizures, prizes, and reprisals, of all ships, vessels, and goods, according to the course of its established practice; and it is not necessary for the High Court of Admiralty to obtain the direct sanction of the Legislature to enable it to act as a Court of Prize. Lord Stowell has observed that "it is the common practice of European States in every war to issue proclamations and edicts on the subject of Prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed from habit and ancient practice, as regularly as afterwards they conform to the express regulations of their Prize Acts[7]. The original and exclusive Jurisdiction of Courts of Admiralty over questions of Prize or no Prize, and who are the captors, notwithstanding any of the Prize Acts, has also been repeatedly recognised by the Common Law Courts at Westminster[8].

Jurisdiction of Courts to distribute Prize.

§ 170. It is competent for the Legislature of every country to grant to its Courts of Admiralty a jurisdiction over questions, which they do not possess by Ancient Usage; as for instance, a jurisdiction to distribute the proceeds of prize amongst the captors in certain fixed proportions. On the other hand, the Legislature of a country may restrain its Courts of Admiralty from proceeding in certain matters according to the general Law of the Admiralty; as for instance, British Courts of Admiralty are restrained by

[7] The Santa Cruz, 1 Ch. Rob. p. 62.

[8] Lord Camden and others *v.* Home in Error, 4 Term Reports, p. 382. Lindo *v.* Rodney, 3 Term Reports, p. 613.

the Prize Acts from restoring British vessels to their former owners on the payment of military salvage to the recaptors, wherever "such vessels have been set forth or used as ships or vessels of war by the enemy[9];" the *jus postliminii* is in such cases not recognised. Prior to the sixth year of the reign of Queen Anne the Legislature had not been accustomed to interpose its authority under the form of a general Prize Act, but the Statute (6 Anne, c. 13.) called the Cruisers' Act, which established as a branch of the Royal Navy a permanent fleet of cruising ships, expressly to furnish convoys to merchant vessels, had also for its object to vest the sole interest in all captures made by the King's ships or privateers in the actual captors after final adjudication in a Court of Admiralty. The Law, as it stood with respect to the right of prize before 6 Anne, c. 13[10], may be thus stated. Whatever was taken by any subject of the Crown of England from an enemy in the course of naval operations was Prize of War, and appertained to the Sovereign either *jure coronæ*, or *jure admiralitatis*, according to circumstances. For instance, if a capture should have happened to be made by a private ship not furnished with a Commission from the Crown, the prize belonged to the Lord High Admiral. Such was the decision of the Council held by King Charles II at Worcester House on 6 March 1665–6 for determining the rights of the Lord High Admiral[11]. But the state of the law thereby recognised was found to work prejudicial effects in

[9] The Ceylon, 1 Dodson, p. 106.

[10] There was a further Statute (13 Anne, c. 37.) called the American Act, passed for the regulation of Vice Admiralty Courts. Brymer *v.* Atkins, 1 H. Blackstone's Reports, p. 189.

[11] The declaration of the King in Council will be found in Hay and Marriott's Reports, p. 56, and likewise in a note to the Rebeckah, 1 Ch. Rob. p. 231.

discouraging merchant vessels from resisting the attacks of enemy-cruisers; and accordingly a Statute[12] was soon afterwards passed, under which a merchant ship which had been attacked by and had captured an enemy's cruiser, was declared to be entitled to the same share as a private man-of-war. On the other hand, if a capture should have been made by a private vessel having a Commission to make Reprisals, one tenth[13] of the prize went to the Lord High Admiral, or to the Sovereign *jure admiralitatis*, and the rest was for the benefit of the privateer. Sir Leoline Jenkins, in commenting upon a claim of the Lord High Admiral to the tenth of all prizes, observes, "There is no mention in the Lord Admiral's Patent of these tenths, nor is there any constant uninterrupted custom alleged for them, except in the case of private men of war, from whom the Lord Admiral doth receive his tenths. That the Earl of Warwick had them given him by the late usurpers from the public ships likewise, is yet fresh in memory; and that after they had extinguished the name and office of Admiral (as much as in them lay), they sequestered the tenths, as a distinct thing in the *provenue* of their prizes, and applied them to different uses from the rest[14]." The custom accordingly of the Lord Admiral's tenth would thus appear to have been confined in England to prizes taken by private ships, and originated most probably at a period subsequent to the compilation of the Black Book of the Admiralty[15]. In France, on the other hand, the

[12] 16 Car. II. c. 6.; also 21 and 22 Car. II. c. 11.

[13] The Dixième of the Admiral is recognised in the Ordonnance of Charles VI of France, 7 Dec. 1400. Lebeau, Nouveau Code des Prises, Tom. I. p. 4.

[14] Letter of Sir L. Jenkins to the King in Council. (Wynn's Life of Jenkins, Vol. II. p. 766.)

[15] In the case of privateers the Admiral was entitled to two-thirds of each prize according to the provisions of the Black

Admiral for his support, and in consideration of the dignity of his place, and the importance of his services, had in the year 1400 A. D. "son droit de dixième;" which in 1582[16] was confirmed to him as an established right, not only over all prizes whatever, but over all prisoners. The Statute 4 and 5 William and Mary, c. 25, § 18, gave to privateers the sole interest in all vessels captured by them, without a deduction of the tenth for the Lord High Admiral or the Commissioners for executing his Office. The same Statute gave to privateers four fifths of the cargo, and to King's ships one third of the proceeds of each capture. It was however felt in the next ensuing reign that prize matters ought to be placed on a more liberal footing, as comparisons were drawn, by which the situation of naval officers in the service of France was made out to be more advantageous than the situation of officers in the service of England; so that on the breaking out of hostilities with France, a Royal proclamation was issued by Queen Anne on 1 June 1702, giving to her Majesty's ships half, and to privateers the whole interest in the prize; but no general Parliamentary regulation during that war appears to have been passed on the subject prior to the Statute 6 Anne, c. 13, in 1708. By this Statute the sole interest in the prize was granted both to King's ships and to privateers after condemnation in a Court of Admiralty. A similar policy

Book, which are as ancient as King Edward the Third's time: but in the Chapters "sur les Armemens en Course," which are probably of a date earlier than 1330, and follow the Customs of the Sea in the Consolat del Mar, we find a provision that the Admiral was to have from twenty to forty parts, according to agreement with the parties, who might have fitted out the vessels. (Pardessus, Lois Maritimes, Tom. V. p. 417.)

[16] Letters Patent of Henri III. (16 August 1582.) Lebeau, Tom. I. p. 18.

appears to have been adopted by other States about the same time. The Swedish Ordinance[17] of 1715 granted in like manner the whole benefit of prize after condemnation to the actual captor. The Statute of Anne further provided that the proceeds of each prize should be distributed amongst the captors according to their respective shares, in manner, form, and proportion, as by her Majesty's most gracious proclamation to be issued for that purpose shall be directed and appointed, any law, statute, provision, or declaration to the contrary thereof in any wise notwithstanding. Wherever therefore the capture is made by the King's ships or forces, the interest in the prize is vested in the Sovereign *jure coronæ* until final adjudication. In such cases the property is adjudged by the Court of Admiralty as lawful prize to the Crown, whereupon the Prize Act comes into operation, and transfers the interest of the Crown, after adjudication, to the captors.

Absolute control of the Crown over all captures.

§ 171. As the Prize Acts only vest in the captors the interest of the Crown, after the capture has been adjudicated to be good Prize of War, it is competent for the Crown at any time before adjudication to renounce its interest in any capture, and to direct it to be given up altogether to the claimants, even after prize proceedings have been instituted by the captors. "Prize," says Lord Stowell, "is a creature of the Crown. No man has or can have any interest, but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The Right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal

[17] Collectanea Maritima, p. 175.

of those acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our Constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Parta bello cedunt reipublicæ*[18]." Lord Stowell accordingly held, that as the Prize Act and the Royal Proclamation did not give the property to the actual captors until after final adjudication, the Crown could at any time before adjudication declare, that property, which had been seized under the general Order of Reprisals, should not be further proceeded against as enemy's property, and could direct it to be released. The practice on such occasions prior to the Prize Act of 1708 appears to have been for the Crown to issue an Order in Council directing the release of the property seized[19]; but subsequently to 1708 it would seem, that the Lords of the Admiralty have been accustomed to issue to the captors personally an Order for the release of the property captured by them.

Recaptures subject to the *jus postliminii*.

§ 172. The capture of a vessel is complete as between the belligerents when the surrender has taken place, and the *spes recuperandi* is gone. But as between the original owner of the vessel and a third party in respect of the *jus postliminii*, if the vessel should be recaptured; or as between the captor of the vessel and a third party in respect of the right of the former to dispose of the vessel in favour of the latter by sale or otherwise, positive rules have been introduced, partly from equity, to extend the *jus postliminii* in favour of the original owner; partly from policy, to prevent any irregular conversion of

[18] The Elsebe, 5 Ch. Rob. p. 184.

[19] Various instances of such orders are cited in a note to the Elsebe, 5 Ch. Rob. p. 189.

property, before it has been ascertained to have been lawfully acquired *jure belli*. It was a provision of the Consolat del Mar[20], that if a ship and cargo, which had been captured by the enemy, should have been recaptured by a friendly ship, the recaptor ought to restore the ship and cargo to those who were on board of her, if there should be any persons found on board still alive; but in such a case the recaptor ought to receive salvage remuneration for his trouble, and for any damage which he might have incurred. But this applies only to those cases in which the recaptor has retaken his prize within the jurisdiction and in the waters of the country, to which the ship belongs, or else in a roadstead where the captors have not yet moored their prize, that is, have not placed her in security; otherwise if the prize has been already carried into a place of security by the captors, it is not a case merely for salvage remuneration; but on the contrary it is consistent with justice that the vessel and her cargo ought to belong to the recaptors. Such is the language of the Consolat del Mar on the subject of the recapture of vessels and their cargoes; and such seems to have been the ancient law of Maritime Capture amongst the Nations of Europe, in accordance with the principle of the Roman law, as applicable to persons captured by the enemy, *antequam in præsidia perducatur hostium, manet civis*[21]. "By the consent of Nations," says Grotius, "things are said to be taken in war, when they are so detained, that the first owner has lost all probable hope of recovering them, and cannot pursue them, as Pomponius determines a like question. This takes place when they are brought within the boun-

[20] Customs of the Sea, ch. 245, printed in the Black Book of the Admiralty, App. iii. p. 611, "Of a ship captured and recaptured."

[21] Digest. L. XLIX. Tit. XV. c. 5. § 1.

daries, that is, within the stronghold (*præsidia*) of the enemy [22]."

§ 173. "Under the Law of Nations," says Grotius, "which is applicable to such matters, the case is the same with regard to goods as to persons, whereby we may easily perceive how, when things are said to belong immediately to the captors, it is to be understood with a certain reservation, that they continue in their possession until they are brought *infra præsidia:* whence it seems to follow, that at sea ships and other things are then only said to be captured, when they are brought into the enemy's docks or ports, or into that place where his whole fleet is riding, for thereupon their recovery may be despaired of. But we find that under a more recent Law of Nations it has become the rule amongst European Nations to account such things to be captured, when they have been in possession of the enemy during twenty-four hours [23]." To the same purpose Lord Stowell has observed, "It cannot be forgotten that by the ancient Law of Europe, the *perductio infra præsidia, infra locum tutum,* was a sufficient conversion of the property; that by a later law a possession of twenty-four hours was sufficient to divest the former owner [24]." The rule, that the continuous possession of a ship and cargo on the part of the enemy for twenty-four hours should de-

Rule of Twenty-Four hours possession.

[22] Ceterum in hac belli quæstione placuit gentibus, ut cepisse rem is intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit, aut ut res persecutionem effugerit, ut loquitur in simili quæstione Pomponius. Hoc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id est, præsidia hostium perducta fuerint. (De Jur. B. et P. L. III. cap. 6. § 111. 1.)

[23] Recentiore Jure Gentium inter Europæos populos introductum videmus, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint. Ibid. § 111. 2.

[24] The Ceylon, 1 Dodson, p. 116.

bar the original owner of the *jus postliminii*, in other words should deprive him of all right to reclaim possession of his former ship and cargo, on payment of military salvage to the recaptor, or as Bynkershoek terms it, *salvo servaticio*, seems to have been borrowed from the Laws of the Lombards, and was established after the analogy of the four and twenty hours, which, not without reason was the limit of time, within which a hunter who had wounded a beast might recover possession of it, if it had been taken by another[25]. This rule may be said to have been generally recognised amongst European Nations until the middle of the seventeenth century. Albericus Gentilis speaks of it as the Law of Castile in his day, and it is the Law of the kingdom of Spain in the present day. Lord Stair in his decisions says it is the rule of Law in Scotland. Valin states that a similar practice prevailed in his time in France, and the Law of France in the present day accords with that practice. Crompton, in his treatise on the jurisdiction of Courts, says that it was the ancient Law of England, and that a possession of twenty-four hours on the part of the enemy was a sufficient conversion of property. It has been disputed whether the passage in Crompton applies to maritime capture, although Lord Stowell interprets it in that sense[26]; but there is a specific assertion in Thurloe's State Papers[27] on the part of the Dutch Resident at the Court of St. James in 1656, that,

[25] Si cervus aut quælibet fera ab aliquo homine sagittata fuerit, tam diu illius esse intelligatur, qui eam sagittaverit aut vulneraverit, usque ad aliam talem horam diei aut noctis, quæ sunt horæ viginti quatuor, quando eam postposuerit, et se ab ea tornaverit; nam qui eam post transactas horas prædictas invenerit, non sit culpabilis si sibi habeat ipsam feram. Leges Longobardorum, Tit. XXII. § 6. Lindenbrogii Codex Legum Antiquarum, Tom. I. p. 558.

[26] The Ceylon, 1 Dodson, p. 118.

[27] Thurloe, Tom. IV. p. 589.

after many suits and afterwards appeals had in the Council of the King anno 1632, it was understood that *jure postliminii* no ships ought to be restored, which had been twenty-four hours in the power of the latter. In Denmark the Maritime Code of Christian V (1670–1699) ordains that if an armed ship recaptures a Danish ship, which has been in the possession of the enemy for twenty-four hours, the recaptors shall have the exclusive benefit.

Salvage on Recapture. Practice of Great Britain and of the United States of America.

§ 174. It is within the province of the Legislature of every country to regulate by its municipal law all questions of recapture, which may arise between its own citizens. We find accordingly that in England during the Commonwealth a departure was made from the general Law of Europe in favour of merchants by the Ordinance of 1649, which directed a restitution of all vessels by British recaptors to British subjects upon payment of salvage; and a like indulgence has been continued in successive Prize Acts down to the present day, the only exception being made in the case in which the enemy has fitted out his prize as a man-of-war [28]. It will be sufficient to bring a vessel within this exception, and to leave her subject to the operation of the general Law, if she should have been fitted out as a privateer by the enemy, although she may be navigating as a merchant vessel at the time of her recapture [29]. But it will not be sufficient to deprive her of the protection of the Prize Act, that she should have an additional number of men put on board of her by the captor. A vessel originally armed as a slave ship was captured by a privateer, who put men on board of her; but Lord Stowell

[28] Nostra Signora del Rosario, 3 Ch. Rob. p. 10. The Ceylon, 1 Dodson, p. 105. The Georgiana, ibid. p. 401.

[29] L'Actif, Edwards, p. 186.

held, that as there was no Commission of War, no arming of the vessel, the mere fact of putting an additional number of men on board did not have the effect of defeating the title of the original owner[30]. The practice of Great Britain has been adopted as the rule of their decisions by the Courts of the United States of America. But the regulations of the Municipal Law of a State are not applied to cases of recapture, when the property of Neutrals is concerned. The rule of reciprocity was followed by Lord Stowell in the case of a Portuguese vessel[31], and so in the United States, the Salvage Act of 1800 declared that upon the recapture of neutral property, the rule of reciprocity was to prevail. If the Courts of Neutral States would in the like case restore on salvage, then the American Courts were to restore on the same salvage; if otherwise, then they were to condemn to the recaptors[32]. Thus in the case of an American vessel, which had been recaptured from the British by an American privateer with a valuable cargo on board, the property of French subjects, the Supreme Court of the United States decreed the ship to be restored to the American owners, on payment of salvage to the recaptors, but condemned the cargo as good prize to the captors on the principle of reciprocity, inasmuch as French Courts award to recaptors the entire property, whether it belongs to French subjects, to allies, or to neutrals, in all cases of recapture, after the property has been twenty-four hours in the possession of the enemy[33].

Practice of France, Spain, Denmark, Sweden, and Holland.

§ 175. There are notable differences to be observed in the manner, in which the different States of Europe administer the *jus postliminii* under the provi-

[30] The Horatio, 6 Ch. Rob. p. 320.

[31] The Santa Cruz, 1 Ch. Rob. p. 50.

[32] The Star, 3 Wheaton, p. 92.

[33] The Schooner Adeline and her Cargo, 9 Cranch, p. 244.

sions of their Municipal Law in the case of property recaptured at sea, although the tendency of all modern legislation is in favour of a milder practice, than that which had been generally received before the commencement of the seventeenth century after the analogy, which the Law of the Lombards supplied. The French Arrête of 2 Prairial, an. XI. provided, that if the recapture should have been made by a public ship of war, it should be restored to the original owner on the payment of one thirtieth of its value by way of salvage, if it had been recaptured within twenty-four hours; or of one tenth of its value, if twenty-four had elapsed, the original owners being liable to defray the expenses attending the recapture. If, on the other hand, the recapture had been made by a private ship of war before the lapse of twenty-four hours, the recaptors would be entitled to a salvage of one third; if after the vessel had been twenty-four hours in possession of the enemy, the recaptors would be entitled to the whole as prize. The rule of the French Courts is the same, whether the property recaptured belongs to neutrals, or to French subjects. In Spain the Ordinance of 1801 makes a distinction between the property of Spanish subjects and the property of the subjects of friendly Nations. The rule in regard to the former is, that if the property is recaptured within twenty-four hours, a salvage of one third shall be paid to the recaptors; but if after that time, the recaptors shall take the property as prize. But in regard to the latter, the recaptured ship, unless it be laden with enemy's property, is to be restored on payment of one eighth of its value, as salvage, if recaptured by a public ship; and of one sixth of its value, if recaptured by a privateer; subject however to the condition, that the Courts of the State, under whose flag the vessel sails, should

observe the same rule in regard to Spanish property. Portugal, by an Ordinance of 1797, decreed that restitution should be made of property recaptured after twenty-four hours on salvage of one eighth to a public ship, and of one fifth to a privateer. Denmark, by an Ordinance of 1810, decreed the property of Danish subjects and of allies to be restored without any regard to the length of time which might have elapsed since its capture, on payment of one third of its value, as salvage, to the recaptors. In Sweden the Ordinance of 1788 enacted that, if a Swedish vessel should be recaptured from the enemy, the recaptor should have half her value without respect to the time during which she had been in the possession of the enemy. In Holland the law has undergone great modifications, but at present restitution to the original owners is to be made in all cases, subject to different rates of salvage. Thus the Ordinance of 1659 decreed the restitution of the recaptured property to the original owners in every case, on payment to the recaptors of one ninth of the value, and such continues to be the rule of the Courts in the case of recaptures by public vessels; but in regard to privateers, a later Ordinance of 1677 has decreed to them a salvage of one fifth, if the property should have been recaptured within forty-eight hours; of one third, if it should be recaptured after forty-eight and within ninety-six hours; and of one half, if recaptured after ninety-six hours.

Insurable interest of British captors.

§ 176. All captures *jure belli* are consummated under the Natural Law of Nations by surrender (deditio), in the sense in which a capture enures to the benefit of the Sovereign Power which has authorised the capture[34]; but in the sense in which

[34] In conformity with the rule of the Roman Law, "per solam occupationem dominium prædæ hostibus acquiri," which

a capture enures to the benefit of the actual captor under the Municipal Law of a civilised State, the title of the captor is not complete until it has been submitted to and sanctioned by a Court of Prize. "In later times," says Lord Stowell, "an additional formality has been required, that of a sentence of condemnation in a competent Court, decreeing the capture to have been rightly made *jure belli:* it not being thought fit in civilised society that property of this sort should be converted without the sentence of a competent Court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require that such exercises of war shall be placed under public inspection, and therefore the mere *deductio infra præsidia* has not been deemed sufficient." In accordance with this principle, the actual captors under the British Prize Acts have no formal interest in their captures until after the final adjudication of them, as Prize, by the sentence of a competent Court, although they have been held to have an insurable interest in them immediately after capture. If the actual captor might be regarded in the light of a trustee for the Crown to bring all his captures as soon as possible into port, in order that a competent Prize Court may adjudicate upon them, the captor would have an insurable interest in his capture in his character of trustee; for such was the purport of the judgment of the House of Lords[35], in the case of the Commissioners appointed under 35 Geo. III. c. 80, for the purpose of taking care of and disposing of Dutch

Lord Mansfield has discussed in Goss *v.* Withers, 2 Burrows, p. 683.

[35] Crawford *v.* Lucena, 3 B. and P. in the Exchequer Chamber, and 2 N. R. 269 in the House of Lords. Park on Insurance, II. p. 571.

ships and effects captured at sea by his Majesty's ships of war and brought into the ports of Great Britain. The Lords decided on that occasion, that the Commissioners might insure in their own name in the right of trustees for the Crown. But with regard to actual captors, they have been adjudged to have an insurable interest on other and different grounds. In one case Lord Mansfield[36] held that the captor had under the Prize Act and Proclamation such certain expectation of profit upon the safe arrival of his prize in port, that it gave him an insurable interest in its arrival; whilst in another case Lord Kenyon, Mr. Justice Grose, and Mr. Justice Lawrence, were of opinion that as the captor has the risk of being condemned in costs and damages, if the capture is pronounced to have been unjustifiable, he has a right to insure against that risk[37].

Ancient practice as to prisoners of war.

§ 177. It was formerly the practice of belligerent States to leave to every prisoner of war the care of redeeming himself from captivity, and the captor in each case had a lawful right to demand a ransom for his prisoner. The practice of ransom was in fact a mitigation of the earlier practice under which a prisoner of war became the slave of the captor, and which practice Grotius[38] recognises as conformable to the Law of Nations. But Grotius has at the same time pointed out, that this Law of Nations has neither

[36] Le Cras *v.* Hughes, East, 22 G. III.

[37] Boehm *v.* Bell, 8 T. R. 154. The Nemesis, Edwards, p. 50.

[38] At eo, de quo nunc agimus, gentium jure aliquanto latius patet servitus, tum quoad personas, tum quoad effectus. Nam personas si spectamus, non soli, qui se dedunt aut servitutem promittunt, pro servis habentur, sed omnes omnino bello solemni publice capti, ex quo scilicet intra præsidia perducti sunt, ut ait Pomponius. Neque delictum requiritur, sed hæc omnium sors est, etiam eorum qui fato suo, ut diximus, cum bellum repente exortum esset, intra hostium fines deprehenduntur. De Jure B. et P. L. III. c. 7. § 1 and 2.

been received at all times, nor amongst all Nations, although the language of the Roman jurists on the subject is general, and that an advance has been made in the practice of mankind in the treatment of captives from reverence for the law of Christ. "But even Christian Nations have maintained the practice of detaining prisoners of war in captivity, until a price is paid for them, of which the captor is accustomed to form an estimate at his pleasure, unless there has been some Convention entered into on the subject[39]." Notwithstanding the mitigating influences, which the profession of the same Religion by both the belligerent parties and more especially the profession of the Christian Religion has been found in practice to exercise over the conduct of hostilities, it has been found necessary, within so recent a period as the commencement of the seventeenth century, to stipulate by treaties, that prisoners of war should not be detained as galley-slaves after the war has terminated. Thus it was stipulated in the treaty of 1604[40] between England and Spain, that prisoners of war on either side should be released, although they had been condemned to the galleys. An article in similar terms was introduced into the treaty of 1630 between England and Spain[41]. It would appear from the 101st article of the Treaty of the Pyrenees, concluded in 1659, between France and Spain, that at that time the practice of condemning prisoners of war to the galleys was not altogether abandoned[42]. This practice however was evidently becoming obsolete before the conclusion of the seventeenth century, for we find

[39] Manet etiam inter Christianos mos captos custodiendi donec persolutum sit pretium, cujus æstimatio in arbitrio est victoris, nisi certi aliquid convenerit. De Jure Belli et Pacis, L. III. c. 7. § 9. 2.

[40] Dumont, Corps Diplomatique, Tom. V. Part II. p. 38.

[41] Ibid. p. 623.

[42] Dumont, Tom. VI. Part II. p. 278.

that when Count Solmes, who was serving under William of Orange in Ireland in 1690, threatened to deport his prisoners as slaves to America, the Duke of Berwick threatened to retaliate by sending his prisoners to the galleys in France[43]. Bynkershoek, in commenting on the conduct of the Dutch in 1602, in liberating certain prisoners of war whom their friends would not ransom, observes that it would have been foreign to the manners of that age *moribus, qui nunc frequentantur, alienum,* to have put them to death, or to have sold them as slaves, although he remarks that the Dutch are accustomed to sell, as slaves, to the Spaniards all prisoners of war belonging to Algiers, Tunis, or Tripoli; and that the States General had ordered their Admiral in 1661 to sell, as slaves, all pirates whom he might capture at sea. From a proclamation of Charles I of 23 July 1628, we may infer two facts; first, that a practice of exchanging prisoners during war was growing up; and secondly, that the private interest of the actual captor in his prisoners had not been entirely divested at that time, as we find all prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors, until they should be delivered by way of exchange or otherwise[44]. At a later period of the same century we arrive at greater certainty; for we find in the year 1666 mention made by D'Estrades[45] of a person coming to England in a public capacity from Holland, to negotiate an exchange of prisoners between England and Holland then at war. It seems not improbable that Humanity is indebted to the Dutch for initiating the modern

[43] Bynkershoek, Qu. Jur. Publ. L. I. c. 3.

[44] Rymer, Fœdera, Tom. XVIII. p. 1035.

[45] Lettres de M. le Comte d'Estrades, Tom. III. p. 475.

practice of exchanging prisoners, whilst war was going on[46].

§ 178. It was amongst the provisions (Art. LXIII.) of the Peace of Munster (A.D. 1648) that all prisoners of war should be released on both sides without ransom and without any distinction or reservation; and it is from about the same period that we may date the introduction of *cartels* in Europe for the release of prisoners at a fixed rate of ransom, whilst war is going on. It is not unusual in the present day for two States which are engaged in war against each other to enter into an agreement, which is termed a Cartel, either for the exchange of prisoners, or for their ransom at fixed rates. Such a Cartel was agreed upon on 26 March 1673 between the Duke of Luxemburg on the part of Louis XIV and Count Horn on the part of the States General, under which a proportionate scale of money prices was settled for the ransom of officers and soldiers according to their respective grades, in cases where there was no officer or soldier of equal grade, who could be released in exchange[47]. All medical and surgical officers with their servants were to be released without ransom. Similar Cartels were made between the French and the Dutch in 1675[48], and between the Emperor Leopold and Louis XIV in 1692[49], and between the French and the Imperial armies in Italy in 1701[50]. It is not unusual in modern Cartels to stipulate, not merely for the ransom of prisoners for a pecuniary equivalent, if no exchange of prisoners of equal grade can be effected, but to stipulate for

Modern Cartels for the exchange of prisoners.

[46] 3 Ch. Robinson's Reports, Appendix A.

[47] Dumont, Corps Diplomatique, Tom. VII. Part I. p. 230.

[48] Ibid. p. 292.

[49] Tom. VII. Part II. p. 310.

[50] Martens, Récueil, Tom. III. p. 310.

the ransom of prisoners for a personal equivalent, as for instance in the Cartel of 1780[51] agreed upon between France and Great Britain, a Field Marshal was to be ransomed for sixty pounds sterling, or for sixty private soldiers, each private soldier being allowed to be ransomed for one pound sterling. A Cartel for the exchange of prisoners during war was agreed to between Great Britain and the United States in 1813, under which the same principle was adopted of exchanging prisoners not merely for prisoners of equal rank, but for equivalents in men[52]. During the war of the Allied Powers against Russia (1854-56) frequent exchanges of prisoners took place, and it was agreed, under a special convention between France and England, that whenever the two allied Governments should agree to an exchange of prisoners with the Enemy, no distinction should be made between their respective subjects who might have fallen into the hands of the Enemy, but their liberation should be effected according to the priority of their respective capture, except under special circumstances, which were reserved for the mutual consideration of the two Governments[53]. It seems to have been thought necessary even in the Treaty of Paris (30 March 1856) to stipulate that the prisoners of war on both sides should be immediately released[54]. It is advisable that such a provision should be introduced *ex majori cautela* into all Treaties, even between Powers, which do not recognise the *status* of domestic slavery. Dr. Phillimore has very justly observed, that if prisoners are not released during

[51] Lamberty's Memoirs, Tom. I. p. 694.

[52] National Advocate, May 26, 1813.

[53] Convention of 10 May 1854. Martens, N. R. Gén. XV. p. 595.

[54] Les prisonniers de guerre seront immédiatement rendus de part et d'autre. Ibid. p. 774.

the war, their freedom should always form one of the conditions of the peace, which terminates it[55].

§ 179. The Cartel of 1813, between Great Britain and the United States, provided that American Agents might reside at Halifax and other places, and British Agents at various places within the United States. It is usual, and obviously of the last importance for carrying out the objects of a Cartel, that a Commissary of prisoners should reside in the country of the Enemy; and it is competent for him to grant a pass or special safe-conduct *eundo et redeundo* to ships employed in conveying prisoners who have been exchanged or ransomed[56]. Such ships are denominated *Cartel Ships*. The employment of such ships, whilst it is entitled to every favourable consideration upon the same principles as all other *commercia belli*, by which the violence of war may be allayed, as far as is consistent with its purposes, must be conducted with very delicate honour on both sides, so as to leave no ground for suspicion, that a practice introduced for the common benefit of mankind should be made a stratagem of war, or become liable to fraudulent abuse. In general, when a ship is going on a Cartel, unless there has been a stipulation as to the character of the ship to be so employed, it is immaterial whether she is a merchant ship or a ship of war; but a Cartel ship has no right to trade by carrying either merchandise or passengers for hire[57]; neither is a ship protected from capture when

Cartel Ships.

[55] Commentaries upon International Law, III. p. 145.

[56] The Daifjie, 3 Ch. Rob. p. 143.

[57] The Venus, 4 Ch. Rob. p. 355. Lord Stowell condemned as a Droit of Admiralty some cargo, which had been shipped at Dover on board of a French Cartel ship, which was lying near the quay with her sails set and ready to sail back to France. La Rosine, 2 Ch. Rob. p. 373.

she is proceeding to a port for the purpose of taking upon herself the character of a Cartel ship when she arrives at such port; but she is protected from capture in returning from a port of the enemy, to which she has conveyed prisoners of war, until she has arrived at a port of her own country, for she is protected in the whole *trajectus* between the ports of the two belligerents. There are cases in which the privileges of Cartel have been allowed to vessels employed in carrying prisoners of war back to their own country agreeably to an understanding with the commander of the enemy-forces, although such vessels have not been provided with the formal documents of Cartel. Lord Stowell held that in such a case a Prize Court was placed under an obligation to support the good faith of an agreement, on which the other party had acted with confidence[58].

Ransom of Captures at Sea.

§ 180. The Ransom of Captures at sea comes under different considerations of Law from the ransom of prisoners of war. In the latter case the person of the captive has been brought *infra præsidia*, but with regard to captures at sea circumstances will frequently not permit a captor to bring or send his prize into port. In such a case he may destroy the property of his enemy *jure belli*. Being thus of Right *dominus* of the property which he has taken, he may restore it, if he sees fit, to the owner on an agreement on the part of the latter to pay a specific sum of money by way of ransom[59]. The right of every captor to restore a captured ship and cargo upon ransom is not founded on a formal vested title in the captor to the captured property. Mr.

[58] The Gloire, 5 Ch. Rob. p. 93.

[59] Emérigon, Traité des Assurances, c. 12. § 21. Customs of the Sea, ch. 185, 186. Guidon, c. 6. § Art. 2, 3, 7, and 9.

Justice Story[60] has observed that "whether the property vests after twenty-four hours' possession; or after bringing *infra præsidia*, as seems the doctrine of the Civilians; or after condemnation, as is the doctrine of Great Britain; it is clear that the right to take a ransom exists from the moment of capture. And by the general practice of the maritime world, a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors, at least in respect to the Sovereign and subjects of their own country. Nor is a ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudication of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. In this respect there seems to be no legal difference between the case of a ransom of the property of an enemy, and of a neutral. For if the property be neutral, and yet there be a probable cause of capture, or if the delinquency be such, that the penalty of confiscation might be justly applied, there can be no intrinsic difficulty in supporting a contract, by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid, or agreed to be paid, by the captured."

Ransom Bills.

§ 181. The captor, when he restores a captured vessel to its commander under a Contract of Ransom, takes from the latter what is termed a *ransom bill*, under which the latter binds himself and the owner of the vessel and cargo to pay a certain sum of money at a future day named in the bill. This contract is usually made in duplicate, one of which is kept by

[60] Maisonnaire and others *v.* Keating, 2 Gallison, p. 337.

the captor, and is properly termed the Ransom Bill, and the other is given to the master of the captured vessel, and serves as a Pass or Safe-conduct for him. The master of the captured vessel at the same time delivers up to the captor one of his crew, generally the mate of his vessel, as a hostage for the payment of the money stipulated in the Ransom Bill. The ransomed vessel is thereupon permitted to proceed to a designated port by a prescribed route and within a limited time. A failure to comply with any of these conditions places the vessel and her cargo out of the protection of the ransom bill, otherwise the ransom bill serves to secure the vessel and her cargo from all molestation from the cruisers of the belligerent state of which the captor is a subject, or from the cruisers of its allies, until she has reached the port of her destination. It has been justly observed that all compacts with the common enemy must bind allies, when they tend to accomplish the object of the alliance; otherwise the ally would reap all the fruits of the compact without being subject to the terms and conditions of it, and the enemy with whom the agreement was made would be exposed in regard to the ally to all the disadvantages of it, without participating in the stipulated benefit. Such an inequality of obligation is contrary to every principle of reason and justice[61]. If the vessel should be forced out of the course prescribed, or her voyage should exceed the time allowed in the ransom bill owing to stress of weather or some overpowering necessity, such a circumstance will not work a forfeiture of her safe-conduct; but if she should have no such excuse for her non-observance of the conditions of her ransom, and should be captured a second time, she is

[61] Kent's Commentaries, Tom. I. p. 105. Miller *v.* The Resolution, 2 Dallas, p. 15. Yates *v.* Hall, 1 Term Rep. p. 73.

liable to be adjudged good prize to the second captors, in which case the debtors under the bill of ransom will be discharged from their contract, and the amount stipulated in her bill of ransom will be deducted from the total proceeds of the prize, the residue only going to the second captor[62]. On the other hand, if the vessel of the captors should be taken by the enemy with the ransom bill and hostage on board, the ransom bill is thereby discharged, and it cannot be revived by recapture[63]. So when the vessel of the captor, after he has transmitted the ransom bill, is taken with the hostage on board, the ransom is discharged by such recapture of the hostage[64]. But if the hostage and the ransom bill have both been transmitted by the captor to a place of safety, and the captor's vessel be subsequently taken by the enemy, the ransom remains due notwithstanding such capture. In such a case there is nothing on board the captor's vessel that represents the ransom of the captured vessel; and where the hostage and ransom bill have both been conveyed to a place of safety, it is equivalent to the prize itself having been carried *infra præsidia*. So if the commander of a privateer should have ransomed an enemy's vessel, under a condition, amongst others inserted in the ransom bill, that the full amount should be paid notwithstanding "the hostage should come to die, or to desert, or that the said privateer should perish or be taken with the hostage on board," and the privateer should have been subsequently captured by the enemy with the hostage and ransom bill on board, but the ransom bill should not have been delivered up to the captors of the

[62] Valin, Traité des Prises, c. 11. § 1–3. Pothier, Traité de Proprieté, § 134–137.

[63] Emérigon, Traité des Assurances, c. 12. sect. 23. § 8.

[64] Ibid.

privateer, nor have ever come into their possession, the original captor has been held entitled to recover on the ransom bill[65]. So likewise if the commander of the ransomed vessel should have given a bill of exchange to the captor as an additional security, together with the ransom bill, and the bill of exchange should have been negotiated in good faith to the order of a third party for value received, it is to be paid by the owners of the ransomed vessel, although the hostage should have been recaptured on board the privateer; but if the bill of exchange has not been negotiated for value received at the time of his recapture, the owners of the ransomed vessel are absolved from their obligation under the bill of exchange, as well as under the ransom bill itself[66].

Hostages.

§ 182. When a captor releases an enemy's vessel on Ransom, it is allowable for him to take one or more hostages from the ransomed vessel. The French Ordonnance de la Marine[67] enjoined all captors, if they released a vessel and her cargo *par composition*, to seize all her papers, and to bring away at least two of the principal officers of the captured vessel[68]. In practice however one hostage only is taken, who is liable to be detained as a prisoner of war until the ransom is paid. The validity of the ransom bill does not in any way depend upon the taking of a hostage, but the hostage serves as a security to facilitate the recovery of the ransom in a court of law; for the hostage has a right of action in the courts of his own country against the master, and against the owner of the ship and cargo, to compel them to

[65] Corner *v.* Blackburne, 2 Douglas, p. 640.

[66] Emérigon, c. 12. Tit. XXII.

[67] The practice of ransom is recognised by this Ordinance in Tit. VI. Des Assurances, § 66. and Tit. VII. Des Avaries, § 6.

[68] Valin, Ordonnance de la Marine, Tit. IX. § 19. Lebeau, Nouveau Code des Prises, Tom. I. p. 89. Azuni, Droit Maritime, Tom. II. c. 4. Art. VI.

perform the conditions of the contract under which their property has been restored to them, and the due performance of which is a necessary condition for the recovery of his freedom[69]. But the hostage is merely a collateral security, like bills of exchange, and the escape or death of the hostage does not discharge the ransom bill[70]. The master of a ship cannot bind the owners of the ship and cargo to pay a ransom which exceeds their value[71], as they may always discharge their liability under a ransom bill by abandoning the vessel and cargo to the holders of the bill, just as the owners of a ship and cargo may abandon the ship and cargo in the Instance Court of Admiralty to the holders of a bottomry bond. When the vessel and cargo are insufficient to defray the ransom bill, the master is liable to be personally sued for the payment of the balance of the ransom bill, and for the expenses of the hostage. The loss of the ransomed ship by stress of weather does not discharge the ransom bill or release the hostage. But if the ship and cargo have been abandoned by the owners and sold under a decree of the Admiralty Court, and the proceeds should be insufficient to discharge the ransom bill, and the master should be insolvent, the captor in such a case is bound to release the hostage on payment of the sum for which the vessel and cargo have been sold by the decree of the Court; in other words, the Court of Admiralty will not suffer the money to be paid out of the Registry until the hostage is released[72].

§ 183. The practice of releasing captured vessels on ransom being considered to be less beneficial to

Modern restraints upon ransom.

[69] The Hoop, 1 Ch. Rob. p. 201.

[70] Azuni, Droit Maritime, Tom. II. c. 4. Art. VI. § 5.

[71] The Gratitudine, 3 Ch. Rob. p. 258.

[72] Yates *v.* Hall, 1 Term Reports, p. 80.

the belligerent State, to which the captor belongs, than their detention and conveyance as prize into port, and the power of ransoming vessels being liable to be abused by the captors to the great inconvenience of neutral trade, it has been the policy of the European Powers to restrain the liberty of the captors to ransom their captures. Thus France, by the Ordinance of 15 May 1756[73], forbade any cruiser to ransom any enemy's vessel on any pretext whatever, until she had sent three prizes into port; and by a later Ordinance of 30 August 1782[74] prohibited altogether the ransoming of any enemy's vessel or cargo, or the taking of any hostage, or of any written security whatever, which may be suspected to be a disguised form of ransom. The present law of France on the subject of ransom is contained in the Arrêté of 2 Prairial of the year XI[75], according to which every privateer is bound to send its prizes as soon as possible into the port from which it has been fitted out, unless prevented by stress of weather or the superior force of the enemy; but the commander of a privateer is at liberty to ransom an enemy's vessel, if he is formally authorised by the owners of the privateer under a declaration made by them before the officers of the port from which the privateer is fitted out; but no privateer is permitted under any circumstances to ransom a vessel, which has a neutral passport, under very severe penalties against the captain of the privateer. In Great Britain the Parliament has been accustomed on each occasion of passing a Prize Act since 22 Geo. III. c. 25, (A.D. 1782,) to discountenance altogether the practice of ransoming ships and cargoes belonging to British

[73] Lebeau, Nouveau Code des Prises, Tom. I. p. 547.

[74] Ibid. Tom. II. p. 427.

[75] Pistoye et Duverdy, Traité des Prises Maritimes, Tom. I. p. 281.

subjects, which may have been captured by the enemy, as well as the practice of British captors restoring or discharging any captured ship or cargo of the enemy upon an agreement for ransom[76]. With this object all ransom bills given by British subjects are declared to be null and void; and accordingly no action could be brought upon any such ransom bill in a British Court, whilst the parties who may have given any such ransom bill are liable to be proceeded against in the High Court of Admiralty for heavy penalties, "unless it shall appear to the Judge of the said Court that the circumstances of the case were such as to justify the said ransoming, or contract, or agreement for the same." On the other hand, any Commander of a British cruiser who shall have "actually quitted, set at liberty, restored, or discharged," any ship or cargo, after the same shall have been taken as prize, upon any agreement for the ransoming thereof, "shall for every such offence be liable to be articled in the High Court of Admiralty of England, at the suit of her Majesty in her office of Admiralty, and upon conviction thereof shall forfeit and suffer such penalty or fine as the said Court shall adjudge, unless it shall appear to such Court that the circumstances of the case were such as to have justified the same." The most recent of the prize Acts would thus appear to be perfectly consistent with that view of the Law, which Lord Stowell adopted under the Prize Act which was in force in 1803, when he said, "Ransoms, under circumstances of necessity, are still allowed[77], but the burden of proof of any such existing necessity is imposed by the Statute on the captors." In the

[76] The Act for manning the Navy in the last war against Russia, 17 Vict. c. 18. contains the usual prohibitory enactments against ransom under any form.

[77] Ships taken at Genoa, 4 Ch. Rob. p. 403.

United States Ransoms have never been prohibited by Congress, either in reference to enemy's property or in reference to neutral property. Chancellor Kent, in commenting upon the English view of the Contract of Ransom as having a tendency to relax the energy of belligerents and to deprive cruisers of the chance of recapture, maintains that the practice of Ransom is in many views highly reasonable and humane. Other Nations regard such contracts as binding, and to be classed amongst the few legitimate *commercia belli*[78].

Joint Captures.

§ 184. Joint captures are said to be made when, besides the parties who are actually engaged in the capture, other parties contribute to the surrender of a vessel by constructive assistance. When two or more ships actually take part in a capture, it is usual to speak of them as the actual captors, although the enemy strikes his flag in fact to one of them; but it may happen that the approach of a vessel which has never been able to take part in the contest, has intimidated the enemy and induced him to surrender. Such a vessel cannot be said to be an actual captor, and yet she may have materially influenced the capture by encouraging the efforts of the one party and discouraging the resistance of the other party, at the same time that she may have been using her best endeavours to arrive in time to give actual assistance to her friend[79]. Policy and Equity under such circumstances, concur in pronouncing her endeavours to take part in the contest to have been of assistance to the actual captors, and in regarding her in the light of a constructive captor. Joint captors may accordingly comprise parties who have

[78] Kent's Commentaries, I. p. 104. Azuni, Droit Maritime, Tom. II. c. 4. Art. vi.

[79] La Flore, 5 Ch. Rob. p. 268. The Virginia, 5 Ch. Rob. p. 126.

not taken any actual part in a capture beyond that of having actually set themselves in motion, and arrived within sight of the prize at any time before it has surrendered[80]. It is necessary however, in order to establish a claim of joint capture, to prove that the vessel claiming to be a joint captor was seen by the prize as well as by the actual captor, and thereby caused discouragement to the enemy, whilst she gave encouragement to the actual captor; but it is not necessary to prove that she was seen by the prize at the moment of surrender, if she had been seen by the prize beforehand, and might have been seen at the time of surrender, if the weather had been clear, or the darkness had not intervened[81]. The law is in one respect more favourable to public ships of war than to private ships of war. The *animus capiendi* is always presumed in favour of the former, if they should be in sight[82], as public ships are under a constant obligation to attack the enemy, whenever they may meet with them, whereas private ships of war are not bound to put their Commissions into force upon every discovery of an enemy. In the case therefore of a privateer which claims to be regarded as a constructive joint captor, positive proof must be given that her commander really intended to take part in the contest; either by showing that she was actually engaged in the chase[83], or, if she had been engaged in the contest and been beaten off, that she was still in sight of the enemy and was intending to resume the contest[84]. But a public ship

[80] The Galen, 2 Dodson, p. 19.

[81] The Union, 1 Dodson, p. 346. The Fadrelandet, 5 Ch. Rob. p. 124. Black Book of the Admiralty, I. p. 22.

[82] La Flore, 5 Ch. Rob. p. 268.

[83] L'Amitié, 6 Ch. Rob. p. 267.

[84] La Virginie, 5 Ch. Rob. p. 124. The Santa Brigada, 3 Ch. Rob. p. 52.

of war is entitled to the character of a constructive joint captor, where the actual captor is a privateer, under the same conditions, as if they were both public vessels of war[85]. On the other hand a public vessel which is not under orders to make captures, although its commander may have a Commission of War, enjoys no privilege in respect of a presumed *animus capiendi* over a private vessel, which has a Commission of War. Thus a revenue cutter, of which the commander is authorised but not commanded by his Commission to make captures, was held by Lord Stowell to be in a condition analogous to that of a private vessel of war. Such vessels are not bound to attack and pursue the enemy more than other private vessels of war; and as all which they derive from their Commission is an authority to attack the enemy, they are thereby only put on a footing with private ships of war[86]. On the other hand, transport ships, although they may sail under pennants and are associated with fleets of vessels of war, will not be entitled to the character of constructive joint captors, if they are associated with them solely in their mercantile character; for if they have no Commission of War, they cannot be allowed to establish a claim of mere constructive assistance[87], even if their appearance should have caused actual intimidation to the enemy. Lord Stowell held, that the fact of terror, however strongly proved, would not establish that cooperation, nor that active assistance, which the law requires to entitle noncommissioned vessels to be considered as joint captors. With respect to captures made by boats, it is a general rule that the crews of the ships, to which they belong, are entitled to share as joint captors with the crews

[85] The Dree Gebroeders, 5 Ch. Rob. p. 339.

[86] The Bellona, Edwards, p. 65. La Flore, 5 Ch. Rob. p. 270.

[87] The Cape of Good Hope, 2 Ch. Rob. p. 282.

of their respective boats, unless the capturing boats have been detached for a time from their proper ships, and are attached to some other ship; but the claim of constructive joint capture by boats, founded on the mere facts of such boats being in sight at the time of capture, has been rejected by Lord Stowell[88]. "I am not in possession," he says, "of any case in which a boat, without any actual assistance or previous concert, has been held, from being in sight only, to be entitled to share as a joint captor, even to the extent of the persons composing the boat's crew, much less to establish a claim of joint capture for the whole ship to which the boat belongs."

Distribution of Prize amongst joint captors.

§ 185. The distribution of prize amongst Joint Captors, in the absence of any positive Statute or Ordinance of the State to which they belong, is made upon general principles according to a scale proportionate to their respective force; for in that proportion they may reasonably be supposed to have contributed their aid in overpowering the enemy, if they have actually taken part in the contest, or to have caused an intimidation by their approach, which has led to his surrender, before they have been able to take part in the contest. Bynkershoek, who is adverse altogether to the doctrine of *constructive* joint capture, advocates in the case of *actual* joint captors a distribution according to their respective force, from the difficulty of measuring by any more accurate test the degree in which each has assisted to overcome the enemy. Such a rule is generally adopted in the present day, in cases where the fleets of two or more allied Powers have acted in conjunction. But in the application of the rule different results will be arrived at, according as the respective force of the captors is

[88] The Odin, 4 Ch. Rob. p. 327.

calculated in proportion to the number of guns, or the number of men, or the number of guns and men combined. The British Prize Acts directs the whole proceeds to be divided amongst all the officers and crews of the respective vessels adjudged to be joint captors according to a scale fixed by Royal proclamation, under which all the officers and men of equal rank take an equal share; and the Royal Proclamation[89] of 1854 declares that ships or vessels being in sight of the prize as also of the captors, under circumstances to cause intimidation to the enemy and encouragement to the captors, shall be alone entitled to share as joint captors. The Prize Act[90] further directs the Court of Admiralty, in all cases where her Majesty's ships have acted in conjunction with the ships of a Power in alliance with her Majesty, to apportion to such Ally a share of the proceeds of such prize, according to the number of officers and men present and employed on the part of such Ally as compared with the number of officers and men employed on the part of her Majesty in taking such prize, and without reference to their respective rank. France, by a Decree bearing date 23 May 1854, has adopted a like rule of division[91]. There had been a previous Convention on the subject of prize between France and Great Britain, and each State had directed its Prize Courts by a municipal enactment to observe such a rule of distribution in every case of capture, in which the ships of an Ally were concerned, as would give effect to that Convention. Neither State undertook to distribute the share of its Ally, but the Courts of Prize were directed to transmit the share, apportioned to the Ally, to such persons as should

[89] Royal Proclamation of 29 March 1854.

[90] 17 and 18 Vict. ch. 18. (2 June 1854.)

[91] Pistoye et Duverdy, Tom. II. p. 447.

be duly authorised on behalf of the Ally to receive the same, and whose duty it would be to superintend the distribution of that share amongst the parties entitled to it according to its own laws and regulations. In the United States of America the standard of distribution amongst public ships in cases of joint capture appears to be the combined number of men and guns on board of each ship in sight[92]; but as regards private armed ships no regulation has been adopted, and the distribution is governed by the general rule of prize distribution, namely, in proportion to the number of men composing their respective crews. Such also was the rule of the English Prize Courts in regard to privateers, as settled by solemn adjudications at the Cockpit and in the King's Bench[93]. Mr. Justice Story observes, that "this rule has the advantage of great practical simplicity and general equity. It seems bottomed on the soundest sense, and places the relative force in the power and activity of animated beings, in which it must always ultimately reside, rather than in the mere instruments, which without such power would be useless and unavailing[94].

Condemnation of Prizes brought into the port of an ally.

§ 186. The apportionment of a share of the proceeds of prize to an Ally is within the competency of the Prize Courts of a belligerent Power, for a belligerent Power and its Ally form one State for the purpose of a common war, *unam constituunt civitatem*[95]. In a similar sense the ports of an Ally are equivalent to the ports of the co-belligerent State, to which the capturing vessel belongs, for the purpose of founding

[92] Act of 23 April 1800. (5 vol. U. S. Laws, p. 108.)

[93] Roberts and Hartley, 3 Douglas, p. 311. Duckworth *v.* Tucker, 2 Taunton, p. 7.

[94] The brig Despatch and her cargo, 2 Gallison, p. 2.

[95] The Henrick and Maria, 4 Ch. Rob. p. 60.

the jurisdiction of the Courts of the Captor over the prize. Claims of Prize were originally prosecuted before the Admiral of the Fleet[96] to which the capturing vessel belonged, or his Lieutenant[97]; and although by the Municipal Law of some countries[98] other authorities besides the Admiral or his Deputy-General might hold cognisance of maritime captures, the Admiral or his Vicegerent was the competent judge upon questions of Prize, as between Nations[99]. There was no necessity at any time, as between Nations, for the Captor to bring his prize within the ports of his own State to found the jurisdiction of the Admiral over it: if it was brought *infra præsidia*, so as to secure it from recapture by the enemy, it was sufficient, and this condition is evidently satisfied by the Captor carrying his prize into the port of an Ally. A sentence of condemnation is accordingly held to be valid, if it be passed by a Court of Admiralty sitting in the country of the Captor against a ship and cargo, which have been brought by the Captor into the port of an Ally[100]. The proper and regular Court for the Trial of Prize is the Court of the State to which the Captor belongs; but where the capture is made by the joint forces of two countries, it is usual for the co-belligerent Powers to agree that the adjudication of all questions of Prize shall belong to the juris-

[96] Rymer, Fœdera, Tom. IV. p. 14, anno 1357.

[97] Ordinance of Charles VI of France, anno 1400. Lebeau, Nouveau Code des Prises. Tom. I. p. 1.

[98] Ordinance of Henry VI of England, anno 1496. Rymer, Fœdera, Tom. X. p. 168.

[99] Treaty of Peace and Commerce between Henry VII of England and Charles VIII of France, 24 May 1497. This treaty is well worthy of notice as containing many regulations for the Prize proceedings of the fifteenth century, which correspond with the practice of the present times. Robinson's Collectanea Maritima, p. 83.

[100] The Christopher, 2 Ch. Rob. p. 209.

diction of the country, of which the flag shall have been borne by the officer having the superior command in the action[1]. It is not usual for a belligerent Power to set up a Court of Admiralty within the territory of an Ally, although under treaty the Ally may have granted authority for such a purpose and no principle of the Law of Nations would be violated thereby, inasmuch as co-belligerent Powers form one State as regards operations of war. On the other hand, it would be a violation of Neutrality for a State, which is not a co-belligerent, to allow a belligerent Power to set up a tribunal of Prize within its territory, and to allow it to condemn to the use of the captors the property of the subjects of Powers, with which it is at amity. Lord Stowell accordingly refused to recognise a sentence of condemnation, passed by a French Consular Court set up within the port of Bergen in Norway upon a British vessel, which had been brought in as prize into that port by a French cruiser, Norway being at such time a Neutral Power. Lord Stowell held that the act of the French Consul was "a licentious attempt to exercise the Right of War within the bosom of a neutral country, where no such exercise has ever been authorised[2]."

Treaty between Denmark and Genoa.

Mr. Manning in his Commentaries on the Law of Nations[3] has referred to a Treaty concluded on 30 July 1789 between Denmark and Genoa, as being an exception to the rule, which Lord Stowell on this occasion asserted to be universally received in matters of Prize, namely, that the tribunals of the Law of Nations in those matters should exercise their jurisdiction within the belligerent country. It

[1] Convention between France and Great Britain 10 May 1854. Martens, N. R. Gén. Tom. XV. p. 581.

[2] The Fladoyen, 1 Ch. Rob. p. 146.

[3] P. 381.

may, however, be a question whether the provisions of that Treaty are to be interpreted in such a sense, as will warrant their being regarded as exceptional to the general rule in such matters. The provisions of Art. XIII are as follows:—"Si une des deux Parties contractantes vient à avoir la guerre avec une puissance tierce, l'autre partie contractante, qui est restée neutre, sera la maitresse, en vertu de l'Article IV, d'admettre ou de refuser dans ses ports, de juger dans ses Tribunaux d'Amirauté ou de n'y pas juger des prises, qui se feraient respectivement par les puissances belligérantes[4]." In construing this article of the Treaty regard must be paid to the provisions of Article IV, which stipulate that either party shall enjoy all the rights of neutrality, in case the other should be involved in war, on condition of its observing all the duties of neutrality. It is evident that Article XIII must be interpreted in conformity with Article IV, the object of which was not to enlarge the rights of a belligerent party, but to secure the recognition on its part of the rights of the neutral party. But amongst the rights of a Neutral Power are those of admitting or refusing to admit the vessels of Belligerent Powers to enter its ports, and likewise of admitting or refusing to admit captures to be made within its jurisdiction and in violation of its territory. The stipulations of Art. XIII of the Treaty refer expressly to a jurisdiction to be exercised by the Courts of Admiralty of a Neutral Power in virtue of Art. IV, the object of which is to secure to the Neutral Power the recognition of its full rights of neutrality; and such a result would be furthered by securing to its Courts of Admiralty the right to hold cognisance of all

[4] Martens, Récueil, Tom. IV. p. 449.

questions of Prize involving any violation of those rights. Proceedings in such matters, if originated in a Court of Admiralty of a Neutral Power, might have been *primâ facie* open to objection on the part of a Belligerent Power in the absence of Treaty-stipulations, as the ordinary practice in modern times, in cases where a belligerent vessel has made capture of an enemy's vessel in violation of the territory of a Neutral Power, has been for the Neutral Power to prefer a complaint to the Government of the Belligerent Power; and when the capture is in controversy in a Belligerent Court of Prize, to claim the release of the vessel on the ground of the capture having been made in violation of its territory. But it is perfectly consistent with all due respect to the Rights of a Belligerent, as such, that the Courts of a Neutral Power should take cognisance of captures, which involve a violation of its Sovereignty, if the Captor and his prize should be found within its jurisdiction; and it seems reasonable to construe Article XIII of the Treaty as intended to provide against any dispute on the subject of the exercise of this Right, rather than to accept the interpretation suggested by Mr. Manning, that it was intended to concede to the Belligerent a privilege of holding a Belligerent Court of Prize within Neutral territory.

CHAPTER X.

ON PRIVATEERS.

Privateers distinguishable from Letters of Marque—Gradual Restraint of Private Expeditions on the Sea—Privateers in the sixteenth and seventeenth centuries—A Commission of war must be on board a Privateer—What constitutes a lawful Commission of war—A Privateer may not have two Commissions of war from different Powers—Belligerent Powers may grant Commissions of war to Aliens—British Practice in issuing Commissions to the Commanders of private ships—Restraints upon Privateers—Purport of Instructions issued to British Privateers—Distinguishing Flag of British Privateers—The Flag of Foreign Privateers—Verification of the Military Flag of a Privateer—A Neutral merchant-vessel cannot claim to verify a Privateer's belligerent character—The exercise of the Belligerent Right of Visit and Search regulated by Treaties—Privateers not admitted to the same Comity as Public ships of war—Restrictions upon Privateers in neutral waters—Treaty-Restraints upon neutral Subjects accepting Letters of Marque from Belligerent Powers—Municipal prohibitions against Subjects accepting Commissions of war from Foreign Powers—Privateers under special conventions piratical vessels—Distinction between piracy under special conventions and piracy under the Common Law—Conventions amongst States against the Employment of Privateers—Declaration of the Congress of Paris of 1856.

Privateers are distinguishable from Letters of Marque.

§ 187. PRIVATEERS are armed ships which are fitted out by private persons, and sail under a commander, to whom a Belligerent Power has granted a commission to seize and take the ships and goods of the subjects of an Enemy Power. The term is of English

origin[1], and appears to have been employed to designate a particular class of private armed vessels in the reign of King Charles II; but it is applied in the present day indiscriminately to private ships which sail under Commissions of War, and to private ships sailing under Letters of Marque and Reprisals. The former class of vessels however is essentially distinguishable from the latter class, inasmuch as a Letter of Marque and Reprisals may be granted to the commander of a private ship in time of peace, and only empowers the bearer of it to make Reprisals against the ships and goods of the subjects of a Power, which has refused to make reparation for an injury done by one of its subjects; whereas a Commission of War empowers the person, to whom it is granted, not merely to seize and take the ships and goods belonging to the subjects of the Power, against which War has been declared or otherwise commenced, but such other ships and goods as shall be liable to confiscation pursuant to Treaties and the Law of Nations. The form however and the extent under which Commissions of War may be issued to the commanders of private ships, rests with the discretion of each Belligerent Power, subject however to the same limitations, whatever those may be, which the Law of Nations has attached to Commissions of War issued to public ships[2].

[1] The Dutch name for them is Kapers or Commissie-vaarders. Cf. Bynkershoek, Obs. Jur. Publ. L. I. c. 118. De Prædatoria privata.

[2] The word Privateer, as far as the author is aware, occurs for the first time in a letter of Sir Leoline Jenkins of 5 Dec. 1665. (Life of Sir Leoline Jenkins, II. p. 727.) Lord Clarendon in his Life (II. p. 335), in narrating the events of the same year, 1665, says, "It was resolved that all possible encouragement should be given to privateers, that is, as many as would take commissions from the Admiral to set out vessels of war, as they call them, to take prizes from the enemy."

Gradual Restraint of Private Expeditions on the Sea.

§ 188. It would appear to have been the custom of Sovereign Princes in the fourteenth century, if we may draw any general inference from the practice of the Kings of Aragon, to rely upon the voluntary efforts of their Subjects, whenever there was occasion to resent any injury done to them on the High Seas, and to grant in such cases Letters Patent to the Commander of an armed Fleet (*Armada*), the ships or vessels of which were fitted out at the expense of private persons[3]. Under the authority of such Letters Patent the Captain or Commander-in-chief of the Armada exercised over all the ships and vessels which took part in the expedition a jurisdiction *secundum statum et consuetudinem Armatæ*. The Ordinances *sur les armemens en course*[4], which are generally printed in continuation of the Customs of the Sea in the Consolat del Mar, as if they formed a portion of those ancient Customs, contain regulations for the government of private armed ships going on a cruise, from which it would appear that the Commander-in-chief of the expedition was styled Admiral, and exercised a jurisdiction according to an established usage, *d'après les usages de la Course*. The contents of these Ordinances, the compilation of which is assigned with great probability to the earlier part of the fourteenth century, as the use of artillery was evidently not known when they were drawn up, show that the Commanders of private cruisers did not at such time require any express License or Commission from a Belligerent Power[5],

[3] Privilège pour les armateurs en course de 1330. Pardessus, Lois Maritimes, V. p. 393.

[4] These chapters are a distinct work from the Customs of the Sea, and M. Pardessus has judiciously published them in a separate form. Lois Maritimes, Tom. V. p. 396.

[5] The commission, granted by King Henry VIII (A. D. 1512) to Sir Edward Howard, as Admiral of the Sea, in the expedition against the French King in

nor were they under any obligation to submit their captures to a judicial enquiry in any Court of a Belligerent Power, before they could dispose of them. But with the commencement of the fifteenth century greater order and regularity were introduced into the conduct of Maritime warfare. It had been already stipulated in various treaties of the fourteenth century, that the subjects of the contracting Powers should not have recourse to measures of force, until they had applied in vain to "the Conservators of the Peace," and that the Sovereign Power should not grant Letters of Marque and Reprisals to their subjects, until such application had been made, and made in vain. We find accordingly that Municipal Laws were enacted in various States in the course of the fifteenth century, the object of which was to restrain individuals from committing any violence upon the Main Sea, without having previously obtained authority to that effect from their Sovereign, and to oblige them to bring all their captures into port for adjudication before an Admiralty Tribunal. One of the earliest of such Municipal Laws is the Ordinance[6] of Charles VI of France (A. D. 1400), the third article of which provided, that "if any one, of whatever estate he may be, shall set forth any ship at his own expense to make war against our enemies, it shall be by the permission and consent of our Admiral or his Lieutenant, who has or shall have in right of his said office, the cognisance, corrections, and punishment of all acts done upon the said sea and its dependencies, criminally and civilly;" and further, that "in case our Admiral or

Guienne, authorising him to command all the captains, masters of ships, and others taking part in the expedition, will be found in Rymer's Fœdera, Tom. XIII. p. 229.

[6] Lebeau, Nouveau Code des Prises, p. 1.

one of his lieutenants shall not accompany the expedition to maintain order amongst the parties to it, every Commander of a ship shall swear to bring all his prizes into port and give an account of them to our said Admiral." With a similar object the Statute of Truces was passed in England in 1414[7], under which the Commander of every vessel putting out to sea was bound to swear before the Conservator of the King's Truce and Safe Conducts, that he would not attempt to do anything against the King's Truce and Safe Conducts, and that, if he took anything upon the sea from the King's enemies or from any others, he would cause such things to be brought into the port from which the vessel had sailed, and thereof make full information before the said Conservator, who had power and authority under the Letters Patent of the Crown, and also by Commission of the Admiral of England, to enquire and decide upon all offences against the King's Truce and Safe Conducts upon the Main Sea, "as the Admirals of the Kings of England before this time reasonably after the old Custom and Law on the Main Sea have done or used[8]." This Statute however being found to operate prejudicially in discouraging the King's Subjects from attacking the King's Enemies, provision was made by a subsequent Statute, 4 Henry V. c. 7, (A.D. 1416,) for enabling the King's Subjects, who had been injured by the Subjects of any other Power, upon demand to obtain Letters of Request under the Sign Manual of the Sovereign addressed to that Power, requiring satisfaction to be made according to the rules of justice, and upon failure of such Letters of Request, to obtain Letters of Marque and Re-

[7] 2 Henry V. Stat. I. c. 6. De Lovio *v.* Boit, 2 Gallison, p. 430.

[8] By this Statute it was made High Treason for a Subject to violate the King's Truce or Safe Conducts.

prisals under the Great Seal against the Subjects of that Power[9]. An Ordinance for a similar purpose was issued in 1487 by Maximilian of Austria, after his marriage with Mary of Burgundy, by which it was provided that no person should fit out a ship of war from any port in the Low Countries without the leave and express license of our Admiral or his Lieutenant; and that the Commander of the ship shall swear not to plunder our subjects or the subjects of our friends or allies, but only to make war upon our enemies[10]. It may be inferred from the provisions of two Treaties of the fifteenth century, namely, a Treaty[11] concluded in 1495 between Henry VII of England and the Duke of Burgundy, (Art. 17.) and a Treaty[12] concluded in 1497 between Henry VII of England and Charles VIII of France, (Art. 7.) that the practice was at that time being introduced of taking sureties (*idoneam cautionem*) from the masters or owners of all ships going out to sea, that they would keep the peace towards the Subjects of friendly Powers, and bring all prizes, which they might make, into port for adjudication[13].

§ 189. The origin of Letters of Marque and Reprisals has been discussed in an earlier chapter. The

[9] A Proclamation was made by King Henry VI in 1426 forbidding English captors to proceed to the sale of Prize Goods anywhere but in England, and not before condemnation by the King's Council, the Chancellor, or the Admiral. Rymer, Fœd. Tom. X. p. 368.

[10] Récueil, Van Zeezaken, c. 3. pp. 1–22.

[11] Schmauss, Corpus Jur. Gent. Academicum, p. 142.

[12] This Treaty, which is in Robinson's Collectanea Maritima, p. 83, deserves perusal, as its object was to regulate the proceedings of Courts of Prize; and its regulations are for the most part observed by such Courts in the present day. See Tractatus Deprædationis, concluded between Henry VIII of England and Francis I of France in 1526. Rymer, Tom. XIV. p. 147.

[13] Martens in his Essay on Privateers, § 15, says that he does not find any instance of such sureties being given earlier than 1584 in France, and 1597 in the Low Countries.

introduction of Commissions of War granted to the commanders of private ships, as distinguished from Letters of Marque and Reprisals, may with probability be referred to the Kings of France. It seems to have been the rule of the French Monarchs during the fifteenth and sixteenth centuries to rely altogether upon the zeal and exertions of private citizens, whenever it might be necessary to make War by sea. Thus in 1555, when Margaret of Parma, as Regent of the Low Countries, embargoed all the French vessels which were in the ports of the Low Countries, King Henry II of France applied to the merchants of Dieppe, who fitted out at once a fleet of nineteen ships, and gave battle successfully to the Spanish fleet[14]. That Commissions of War were accustomed at this time to be issued by Sovereign Princes to private ships fitted out either by their own Subjects, or by the subjects of other Powers, may be inferred from a Treaty concluded between the Emperor Charles V of Spain and Mary Queen of Scotland in 1550, in which a clear distinction is made between Letters of Reprisals and Commissions of War: "Revocando quascunque commissiones ac literas patentes tam Repræsaliarum, quam alias quascunque *super facultate belligerandi*, et subditis alterius principis nocendi, sive incolis sive exteris datas et concessas[15]."

Privateers in the sixteenth and seventeenth centuries.

The long period of Maritime warfare which ensued upon the revolt of the Low Countries against the dominion of Philip II, as it gave an extraordinary

[14] Pistoye et Duverdy, Traité, des Prises Maritimes, I. p. 23.

[15] Schmauss, Tom. I. p. 285. This distinction is still more clearly recognised in a Treaty of Alliance concluded between Philip III of Spain and James I of England, in 1604, in which these words occur, "Quascunque Commissiones et literas tam Repræsalium seu de Marcha, quam facultatem belligerandi continentes." Schmauss, Corp. Jur. Acad. I. p. 437.

impulse to the fitting out of private vessels of war, so it furnished occasion for determining more carefully the rights and obligations of the Commanders of such vessels by Municipal regulations, under which sureties were universally required to be given to the Admiral for the good conduct of the Commanders and crews of such vessels, and a course of judicial proceedings was established for determining the legality of the captures made by them. The Edict concerning the jurisdiction of the Admiralty issued by Henry III of France in 1584, contained various provisions on the subject of private ships of war, with the view of restraining the excesses of their Commanders and crews[16]. The instructions for the Colleges of Admiralty in the Low Countries followed in 1597[17]. The Proclamation made by Queen Elizabeth of England in 1602[18], and the Spanish Ordinance for the navigation of Cruisers issued in 1621, had equally the same object in view[19]. The Parliament of England does not appear to have legislated on the subject of Privateers before the 4th and 5th of William III. c. 25, but the Proclamation of Queen Elizabeth of 1602 had evidently in view the regulation of private ships of war, when it provided that no man-of-war should be furnished or set out to sea without license[20] under the Great

[16] Lebeau, Nouveau Code des Prises, p. 19.

[17] Instructie voor de Collegien ter Admiraliteyt, 15 Aug. 1597. Récueil Van Placaarten, D. I. pp. 1–26.

[18] Proclamatio Regia ad reprimendas Deprædationes super mare. Rymer, Tom. XVI. p. 436. Robinson's Collect. Marit. p. 21.

[19] Ordenanza para Navigar in Corso, 24 Dec. 1621. D'Abreu, Colecion de los Tratados. Phil. IV. Tom. I. p. 555.

[20] In the articles on the subject of prize which came under the consideration of the Royal Commissioners in 1601, it is provided that ships under the immediate commission of the Sovereign were to be regarded as Royal ships. Such ships are evidently distinguished from those contemplated in the Pro-

Seal of the Admiralty of England upon sufficient bonds with sureties first given to the Judge of the High Court of the Admiralty or to his Deputy, for the good behaviour of themselves and company towards her Majesty's Friends and Allies. And further, that no prizes taken shall be disposed of till adjudication given by the said Judge, and order given by him for the disposing thereof, under pain of confiscation of ship and goods. The Act-books of the High Court of Admiralty of England in matters of Prize do not throw any light on this period, as they do not extend further back than 1643[21], and there are no sentences preserved of more ancient date than 1648[22]. The period of the Commonwealth next following is also a blank in the history of the Law of the English Prize Courts; but on the breaking out of the first Dutch war (A.D. 1664) in the reign of Charles II, the King created a new kind of Commission consisting of the Lords of the Privy Council, for the hearing and determining of all matters and questions that might happen to arise concerning Prizes and Captures.

The following Order in Council[23] was issued on this occasion at the Court of Whitehall, Feb. 4, 1664:

clamation of 1602 as having a license under the Great Seal of the Admiralty. *Private Ships of war* are recognised in terms by 22 and 23 Car. II. c. 11. § 11.

[21] It appears from Rymer's Fœdera, Tom. XVIII. p. 731, that King Charles I issued a Commission to Lord Carleton, Sir John Coke, Sir Julius Cæsar, and others, in 1626, to make enquiry and to settle a system of prize proceedings agreeably to the law in such cases, and what is therein practised by other nations. The result of this enquiry does not appear to be on record. Robinson's Collectanea Maritima, p. 69.

[22] Lindo *v.* Rodney. Douglas Reports, p. 616.

[23] This order is copied from a MS. book in possession of the author, which purports to be copied from a book belonging to Sir Nathaniel Lloyd, her Majesty's Advocate General in 1710, containing copies of papers belonging to his father, Sir Richard Lloyd, Advocate General of the

By the Right Hon. his Majesty's Principal Commissioners for Prizes.

Whereas we are informed that upon trial and adjudication in the Court of Admiralty of several ships taken as prizes, you proceed to the condemnation of the bottoms as Dutch, and respite your Sentence as to the Goods with offer of time and liberty unto all claimants, who are likely to withdraw, by their pretended proofs, great quantities of the cargo of ships condemned.

We therefore in pursuance of his Majesty's command, and to prevent that the seizure of all enemy's ships may not by such liberty of claiming the goods become wholly ineffectual, and his Majesty having further declared himself that he will speedily send you Rules for your better direction therein, do hereby pray and require you to respite all proceedings of that nature until you receive further orders.

ALBEMARLE,	ST. ALBANS.
JNO. BERKELEY.	LAUDERDALE.
WM. MORRIS.	HEN. BENNETT.
	ROBT. SOUTHWELL.

The Lords Commissioners thereupon appointed a body of Civilians to review the maritime Law, and to compile a body of Rules and Ordinances, by which the Judge of the Admiralty for the time being should proceed in the adjudication of Prize[24]. Sir Leoline Jenkins was one of the Civilians selected on this occasion by the Lords of the Privy Council, and a body of Rules and Regulations was prepared by him and his colleagues, which was approved by his Majesty in Council, and has been the standard of all subsequent proceedings in the English Prize Court.

§ 190. When War exists between two independent Powers, all the Subjects of the one are the enemies

Lord High Admiral in 1674, and subsequently Judge of the Admiralty.

[24] Prize, as observed by Lord Mansfield, is not a *civil* or *marine cause*, to be heard and decided according to the Process of the Instance Court of Admiralty, but the whole system of litigation and jurisprudence in the matters of Prize is peculiar to itself. Lindo *v.* Rodney, 2 Douglas, p. 614.

of the other, and are of right entitled to do all such acts to the Subjects of the other, which War justifies between the Belligerent Powers themselves.

A Commission of War must be on board a Privateer.

A private ship accordingly which is the property of the Subject of a belligerent Power, and is not furnished with a Letter of Marque or Commission of War, may nevertheless lawfully attack a private ship, which is the property of an Enemy, because a state of War exists between them, and a state of War authorises the one to attack and capture the other. It may indeed happen that the Municipal Law of the Belligerent State, to which the Captor belongs, has declared all captures made by private ships not having Commissions of War or Letters of Marque[25] to be Droits of the Lord Admiral, or it may have declared that captures made by non-commissioned ships shall under certain circumstances be shared amongst the crews in the same way as in the case of private ships having a Commission of War[26], but such distinctions do not arise under any Common Law amongst Nations; they are the creatures of Municipal Law, and may be varied at the pleasure of the Sovereign Power.

The case is otherwise however with regard to a ship, which is the property of the Subjects of a Belligerent Power, if it should venture to attack another ship belonging to the Subjects of a Neutral Power. In such a case the attacking vessel, if the Commander of it be not furnished with a

[25] Under the Order of Council of 6 March 1665-6, declaring what shall be Droits of the Admiralty of England, it was declared that all enemy's ships and goods casually met at sea and seized by any vessel not commissionated, do belong to the Lord High Admiral. The "Rebeckah," 1 Ch. Rob. 227. The "Melomane," 5 Ch. Rob. p. 42.

[26] The 22 and 23 Car. II. c. 11. § 11. provided to that effect, when the private ship had been attacked and had captured its assailant.

Commission of War from the Belligerent Power, may be treated as a pirate by the neutral vessel which she has attacked, or by any vessel coming to the aid of the latter; and even if the assailant should succeed in capturing the neutral vessel, the latter would be entitled to be released by a tribunal of Prize, inasmuch as the capturing vessel had not any Commission of War. Every vessel, claiming to act as a private ship of War, must have her Commission of War on board. Thus a British vessel claiming to have a Commission of War from the King of Portugal against the Castilians and Moors, captured a vessel belonging to Ostend in the British Channel, and brought her Prize into the port of Dover, where the Prize was taken possession of by the officers of the Customs. It appeared that there was only on board the Captor's vessel a transcript of a Commission from the King of Portugal, translated into French, and attested for a true translation under the hand and seal of the French Consul at Lisbon. Sir Leoline Jenkins[27], acting as judge of the Admiralty, advised the Lords of his Majesty's Council, that amongst other grounds why the capture was unduly made, and the Ostender ought to have his ship and goods restored to him, the true Commission was "neither pretended, showed, nor indeed on board, at the time of the capture[28]." On the other hand, if the Commission of War has been lost since the capture has been made, Courts of Prize have allowed the fact

[27] Life of Sir Leoline Jenkins, Vol. II. p. 727. A.D. 1665.

[28] In the case of an acknowledged Independent Power the seal of the Commission is held to prove itself; but when a Civil War is raging in a foreign country, and one part of the population separates itself from the old Government, and places itself under a new distinct Government, the seal of a Commission issued by the new Government cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. The United States *v.* Palmer, 3 Wheaton, p. 644.

of such a Commission having been on board the Privateer at the time of the capture to be proved by oral evidence. Thus a question came before the Supreme Court of the United States, in regard to a vessel and cargo which had been captured by a Venezuelan Privateer, which had been subsequently lost before a Prize Court had adjudicated upon the capture. It was attempted by the former Spanish owner of the vessel and her cargo to obtain restitution of his property from the American Prize Court, on the alleged ground amongst others, that the Privateer had not any Commission of War on board at the time when she captured the Spanish vessel. The Court however on this occasion allowed the Prize-crew to prove by oral evidence that the capturing vessel had a Commission from the Government of Venezuela at the time the capture was made, which had been issued and delivered at Carthagena, and that the Commission was lost on board of her, as she sank almost immediately after the Prize-crew had taken possession of the Spanish vessel[29]. All Codes of Maritime Law recognise the necessity of a Commission of War being on board a Privateer. Thus the French Ordonnance de la Marine (A.D. 1681)[30] whilst it enacted that no one should fit out a vessel of war without a Commission from the Admiral, declared in its fourth article all vessels to be good Prize, which should be found cruising on the sea without a Commission from some Prince or Sovereign State. The Spanish Ordinance of 1718[31] embodies in its sixth article the identical provision of the French Ordinance; and the British Naval

[29] The Estrella, 6 Wheaton, p. 304.

[30] Lebeau, Nouveau Code des Prises, Tom. I. p. 82.

[31] Tratado Juridico-Politico sobre Pressas de Mar su autor Don Felix Joseph de Abreu y Bertodano, Cadiz, p. 318.

Instructions, which were published in 1730, declared that if any ship or vessel shall be taken acting as a Ship of War or Privateer, without having a Commission duly authorising her to do so, her crew shall be considered as pirates and treated accordingly[32].

What constitutes a lawful Commission of War.

§ 191. What constitutes a lawful Commission of War has been occasionally in dispute. After the revolt of the Low Countries against the dominion of Philip II, not only Spain, but other Powers, refused to recognise the lawfulness of the Letters of Marque and Reprisals issued by the Prince of Orange in 1569, on the ground that he was not competent to grant them, not having any Admiralty jurisdiction: but after he had been nominated Admiral of the United Provinces in 1576, the Neutral European Powers recognised the legality of his Letters Patent, although Spain continued for a considerable time to treat the *sea-beggars*, (for such were they called by way of contempt,) as pirates[33]. The question, as it regards the relations between a revolted Province and the Mother Country, may be embarrassed by considerations arising out of the Municipal Law of the Mother Country; but as regards third Powers, if there be a state of War between two Communities of men, neither of which recognise *de facto* any political Superior, vessels sailing under the flag of either Community are entitled so far to the *jura belli*, that they cannot be treated as pirates by the public ships of Neutral Powers. Thus the armed schooner Invincible, sailing under the flag of the newly-constituted Republic of Texas, captured in the month of April 1836 the American brig Pocket, carrying munitions of war to a port within the territory of Texas for the use of

[32] The same directions are given in the British Naval Instructions of 1806 and of 1826.

[33] *Les gueux de mer* was the name given to these privateers by the Spaniards.

the Mexican army, then attempting under the command of General Santa Anna to reconquer that former Province of Mexico. The United States ship of war Warren thereupon captured the Texian schooner as a pirate, and brought her to New Orleans for condemnation in that character. The Attorney General of the United States on this occasion laid it down in his Report to the President of the United States, that when "a civil War breaks out in a foreign Nation, and part of such Nation erect a distinct and separate government, and the United States, although they do not acknowledge the independence of the new government, *do yet recognise the existence of a civil war*, our Courts have uniformly regarded each party as a belligerent Nation in regard to acts done *jure belli*. Such may be unlawful when measured by the Law of Nations or by Treaty-stipulations; the individuals concerned in them may be treated as trespassers, and the Nation, to which they belong, may be held responsible by the United States; but the parties concerned are not treated as pirates. It is true, that when persons acting under a Commission from one of the belligerents make a capture ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In this present case there is not the least reason to believe that the capture was made with any criminal intent. It would seem to be an infraction of the Treaty made in 1831 between the United States and the United Mexican States, (of which Texas was then a constituent part;) and there may be other reasons for doubting its legality as an act done in the Right of War; but that it was really done in that character, and no other, is very clear. The existence of a Civil War between the people of Texas and the authorities and people of the other Mexican States was recog-

nised by the President of the United States at an early day of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican Government. This recognition has been since repeated by numerous acts of the Executive, several of which had taken place before the capture of the Pocket. On the assumption that the actors were aliens, the case is therefore fairly brought within the principle above stated, and the charge of piracy cannot be sustained[34]." This opinion of the Attorney General of the United States is justly based on the assumption, that the Rights of War as between Belligerents and Neutrals are essentially Rights of Good Faith.

A Privateer may not have two Commissions of War from different Powers.

§ 192. Martens, in his Essay on Privateers, observes, that there is nothing that prevents a belligerent Power from granting Letters of Marque and General Reprisals to the subjects of an allied or even of a neutral Power; but that no person is allowed to take Commissions from two Princes, even if they be Co-belligerents[35]. In support of this view, we find that the Spanish Ordinance of 1621 declared that those vessels, which have Commissions from two different Princes or States, shall be declared good Prize; and if they be armed for war, the Captain and officers shall be treated as pirates. The French Ordinance of 1681 provides in like manner, that every ship having a Commission from two different Princes or States shall be good Prize; and if it is armed for war, the Captain and officers shall be punished as pirates.

[34] Letter of 17 May 1836 of the Attorney General, B. F. Butler, to the President of the United States. Opinions of the Attorneys General of the United States, Vol. III. p. 120.

[35] Bynkershoek, Obs. Jur. Publici, CXVII. Sir Leoline Jenkins's Works, Vol. II. p. 714.

If it is borne in mind, that a common object of Municipal Ordinances and International Compacts in regard to Privateers, has been to secure that the conduct of their Commanders and crews on the High Seas shall be controlled by the Admiralty Courts of the Power, under whose Commission they undertake to make prize of Neutral property, and that it is a regulation of the Municipal Law of most States, that a Privateer shall give securities to bring all its captures into the port, from which it has been fitted out; it is obvious that no adequate supervision could be maintained in the manner contemplated over Privateers, if the Commander of a Privateer were at liberty to accept a Commission from more than one Power[36]. The reasons for this prohibition are equally valid in the case of two Co-belligerent Powers. On the other hand, there is nothing to prevent the Commander of a Privateer from holding two Letters of Marque issued by one and the same Power against two different Powers: for instance, Great Britain might be at war with Spain, and might see fit to grant Letters of Marque to private ships against Spain; and upon war subsequently breaking out with France, might further see fit to grant to the Commanders of the same ships Letters of Marque against France. Such additional Letters of Marque will be perfectly lawful, for even without such Letters of Marque against France, the Commander of a British vessel will be justified under the Law of Nations in attacking and capturing French vessels, if war should have broken out between Great Britain and France, as all the subjects of the British Crown have thereupon become enemies of the subjects of the French Crown. But

[36] It is a Municipal regulation of most of the European States, that all prizes made by vessels cruising under their flag shall be brought into their ports, and *nowhere else*, for adjudication.

the Commander of a British vessel will not be justified, until he has obtained a Commission of Marque against France, in capturing Neutral vessels for carrying Contraband of War to French ports. Further, whatever Prize he may have made *jure belli* of Enemy's property, all the interest in such Prize will accrue to the Lord High Admiral, until he has obtained a Commission of Marque against France. Such was the decision of the High Court of Admiralty in the case of the Grand Terrein[37], a French ship, taken by the Tartar privateer, which had a British Commission of Marque against American property, and had petitioned the Lords of the Admiralty for a Letter of Marque against France on the day before the French ship was taken. The French ship was held in this case to be good Prize, as being Enemy's property; but it was condemned as a Droit to the Lord High Admiral.

Belligerent Powers may grant Commissions of war to aliens.

§ 193. There is nothing in the Common Law of Nations which forbids a Belligerent Power from granting Letters of Marque or Commissions of War to aliens, even if they should be the subjects of the Enemy-Power[38]. Thus we find that the Commission, which it is usual to issue under the Great Seal of Great Britain to the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral[39], empowers them "to issue forth and grant Letters of Marque or General Reprisals to any of our loving subjects, *or others*, whom he or they may deem fitly qualified in that behalf, for taking the ships, vessels, and goods, belonging to the enemy or to any persons being subjects of the enemy, or inhabiting

[37] 1 Hay and Marriott, p. 155.

[38] The Mary and Susan, 1 Wheaton, p. 46.

[39] Such is the form of the Commission which was in use in the reign of George II. Beauwes, Lex Mercatoria, Tom. II. p. 341; and also in the reign of George III. Marriott's Formulary, p. 104.

within any of his territories." The Swedish Ordinance of 19 Feb. 1715[40] recites in terms that Commissions are to be granted not only to Swedes, but to the Subjects of foreign Powers: "Le Roi voulant bien permettre, non seulement à ses propres sujets, mais aussi *à ceux des Puissances Etrangères*, d'aller en course sur tous ceux qui contreviendront à ce Règlement, un chacun qui souhaitera d'avoir une Commission d'Armateur, l'obtiendra de Sa Majesté ou de ses Amiraux: mais ceux qui ne seront pas munis d'une telle commission, n'auront point la permission d'aller en course."

British practice in issuing Commissions to the Commanders of private ships.

§ 194. The practice in regard to the issuing of such Commissions was for a party, who might be desirous to obtain Letters of Marque or General Reprisals for a vessel of which he was owner or part owner, to petition the Lord High Admiral, or the Commissioners for executing his office, to grant a Commission to the Commander of the vessel specified by name; and for the Lord High Admiral or the Commissioners for executing his office, if they were satisfied of the sufficiency of the vessel and her crew, thereupon to issue a Warrant to the Judge of the High Court of Admiralty, directing that a Letter of Marque and Reprisals should be issued to the Commander, named in the Petition, out of the High Court of Admiralty[41]. It was usual for the Crown, at the same time that it issued its Commission under the Great Seal, to issue Instructions under the Royal Signet and Sign

[40] Mémoires de Lamberty, Tom. IX. p. 226.

[41] It was provided by 43 Geo. III. c. 96, that the owners of all privateers should nominate and register a Proctor in the Court, where they obtained their Commission or Letter of Marque, that service upon him was binding for the Commander, owners, and sureties, and that such owners and sureties are liable to decrees immediately after seizure.

Manual addressed to all Commanders of Privateers, in a separate form from the Instructions issued to the Commanders of King's ships, although on some occasions the Instructions to the Commanders of either class of vessels were conjoint Instructions. These Instructions were binding upon the Commander of every privateer, who upon obtaining a warrant from the Lord High Admiral or the Commissioners for executing the office, was required to appear in the Registry of the High Court of Admiralty, and there make a declaration respecting the tonnage and fittings of his vessel, and to sign and execute a bond to the Crown with two approved sureties, that he would in every respect conform himself to the Instructions issued by the King in Council, and to all future Instructions. It was accordingly to his Instructions that the Commander of every privateer was bound to look for the interpretation of the general language of his Commission, and the authority contained in these Instructions, equally as the Commission, was granted to the Commander personally. It was necessary therefore that the Commander himself should be on board the privateer at the time of its making any capture, in order that the legal interest in the capture should enure to the private captors under the Commission. In the case of the "Charlotte" privateer[42], Lord Stowell held that a capture made by her, when her Commander was on shore, must be condemned as a Droit of the Admiralty. An exception appears to have been made in favour of the captors on one occasion, where the Commander of the privateer being dead, the Lieutenant had captured the prize[43].

[42] The Charlotte, Witt. 5 Ch. Rob. p. 280.

[43] In a MS. note-book in the possession of the author, purporting to contain notes of Sir Nathaniel Lloyd, Advocate Ge-

But in most cases in modern times, where non-commissioned captors have made prize of enemy's property, it has been usual for the Crown to grant to the captors on their petition the ships and goods of the enemy, although the same have been taken without any legal authority or Commission of War. Such is the purport of a Report[44] made by Sir James Marriott, the King's Advocate General, in 1765, to the Lords Commissioners of the Treasury. According to that Report the practice in the High Court of Admiralty of Great Britain has been for the Lord High Admiral to proceed for Droits by his own Law Officers, ever since the time of the Duke of York, who was Lord High Admiral in the reign of King Charles II, and who, subsequently to his appointment and to the Order in Council of 6 March 1666 declaring the Droits of the Lord High Admiral, granted them back to the Crown. This precedent of granting back the Droits of the Lord High Admiral to the Crown was followed by Prince George of Denmark, after he had been appointed Lord High Admiral, and by the Earl of Pembroke; but whenever the office of Lord High Admiral is in Commission, the Droits of the Lord High Admiral remain vested in the Crown.

Restraints upon Privateers.

§ 195. The Commission of a Privateer, although it is issued in general terms, is taken subject to all the restraints, which the legislature may have imposed upon it. In the case of British privateers, their Commissions are revocable by the Lord High Admiral or the Commissioners for executing his

neral in 1716, there is this passage: "The Privateer's Captain being dead, the Lieutenant took a prize. Salvo jure Admirali, for once adjudged to the owners of the Privateer. 30 May 1704."

[44] MS. book of Sir James Marriott, in possession of the author.

office. In the case of privateers belonging to the United States of America, their Commissions are revocable by the President. Under the Prize Act of 1812, the President of the United States was empowered to grant, annul, and revoke at his pleasure, the Commissions of privateers, and by the Act declaring War he was authorised to issue the Commissions in such form as he should deem fit, and further to establish and order suitable Instructions for the better governing and directing the conduct of private armed vessels commissioned under that Act, their officers and crews. "It has been the great object," observes Mr. Justice Story[45], "of every maritime Nation to restrain and regulate the conduct of its privateers. They are watched with great anxiety and vigilance, because they often involve the Nation by irregularities of conduct in serious controversies, not only with public enemies, but with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign Powers." The Commission of a privateer was declared by the British Prize Act to be forfeited upon due proof of the breach of any of his Majesty's Instructions relating to Prize, or of any offence against the Law of Nations; and upon representations being made to the Lords of the Admiralty, that the Commander of any privateer had committed a breach of his Instructions or offended against the Law of Nations, it was usual for them to direct proceedings to be instituted in the Admiralty Court against the privateer to deprive her Commander of his Commission[46]. Such a proceeding

[45] The Thomas Gibbons, 8 Cranch, 428.

[46] The Mariamne, 5 Ch. Rob. p. 10.

was *ad publicam vindictam*, and was intended to prevent a repetition of bad conduct. The misuse of the authority conveyed to the Commander of a privateer by his Commission rendered her Commander and the owners liable in damages to the party injured; and each part-owner, if there were several, was liable not merely *pro rata* for his own share respectively, but for the total amount of what might be awarded against them all[47]. So far back as 1672[48] it was held that every owner of a privateer is liable *in solidum* for damages awarded against the master and owners of the vessel.

Purport of Instructions issued to British Privateers.

§ 196. The Instructions, which have been generally furnished to British privateers, authorise them to attack and seize all men-of-war, ships, and other vessels whatsoever, as also all goods, wares, and merchandises belonging to the enemy, but so as not to commit any hostilities within the harbours of Powers or States at amity with Great Britain, or in their rivers, or roadsteads, within the shot of their cannon; also to attack and seize all ships carrying Contraband of War to the ports of the Enemy, and all ships, whatever be their cargoes, that may be found attempting to enter any blockaded ports. It has been usual for the Crown to issue additional Instructions[49] from time to time to privateers, as occasion may require, equally as to public vessels of war, for the purpose of restraining or enlarging, as the case may be, the exercise of the powers contained in their Commissions. The Commanders are further required by their Instructions to bring their prizes into port for adjudication, to aid and

[47] The Karasan, 5 Ch. Rob. p. 292.

[48] Praris *v.* Captain Martine and his owners, A.D. 1675. Lord Stair's decisions, Vol. II. p. 239.

[49] Marriott's Formulary, pp. 46–49, 54.

succour all co-belligerent vessels, to make reports from time to time of their proceedings to the Lord High Admiral or the Commissioners for executing his office, to refrain from ransoming their prizes, to deliver up all prisoners of war to Commissioners authorised to take charge of them, to send copies of their journals to the Secretary of the Admiralty, and not to hoist any jack, pennant, or other ensign or colours usually borne by King's ships; but besides the colours usually borne by merchant ships, to wear a red Jack with the Union Jack described in the canton at the upper corner thereof near the staff. Such appears to have been the substance of the Instructions issued on 30 Dec. 1739 for the Commanders of such ships and vessels, as may have Letters of Marque or Commissions for private men-of-war against the King of Spain, his vassals, and subjects inhabiting within any of his Countries, Territories, or Dominions, by virtue of our Commission granted under the Great Seal of Great Britain bearing date the thirtieth day of November 1739[50]. It appears that precisely similar Instructions, as to the distinguishing Jack to be carried by British privateers, have been issued on all subsequent occasions.

Distinguishing Flag of British Privateers.

§ 197. The French Ordinance of 1681 may be regarded as furnishing a permanent body of Instructions to the Commanders of all ships having Commissions from the Admiral, but it has been supplemented by Regulations on the subject of Prize issued from time to time, as circumstances may have

The Flag of Foreign Privateers.

[50] A copy of these Instructions will be found in Beawes, Lex Mercatoria, edited by Chitty, Vol. I. p. 345. These particular Instructions are silent on the subject of blockade, but Instructions to privateers on the subject of Blockade will be found in Marriott's Formulary, p. 49.

called for them[51]. They are silent on the subject of a special flag to be used by private ships of war, as distinguished from public vessels of war. The ordinance of 15 April 1689 established special ensigns for vessels of commerce, and two other ensigns seem to have been in use in the French mercantile marine before 1789[52]; but since that period the same ensign has been borne by vessels of war as by vessels of commerce, the use of a pennant having been reserved to the former[53]. It does not appear that French privateers are required to carry any special flag to distinguish them from vessels of war belonging to the Crown, although the latter may have been always distinguishable from them in fact by some special signal serving to denote the rank of the naval officer in command of them. By the Law of 31 Oct. 1790, which purports to fix the colours, which the different kinds of French flags used on board of French vessels ought to bear, the *flamme* or pennant is spoken of as the distinguishing mark of vessels of war and other ships of the State; the only other class of vessels mentioned in that Law being vessels of commerce[54].

It does not appear from either of the Spanish

[51] This Ordinance and the supplemental regulations may be consulted in Lebeau, Nouveau Code des Prises, p. 80.

[52] Les vaisseaux marchands porteront l'enseigne de poupe bleue avec une croix blanche traversante, et les armes de S.M. sur le tout, ou telle autre distinction, qu'ils jugeront à propos, pourvu que leur enseigne de poupe ne soit point entièrement blanche. Ordonnance de Louis XII, 15 April 1689, L. III. Tit. III. Art. I. The tricolor ensign, which is borne in the present day by all French vessels, was reestablished as the National ensign by a decree of 7 March 1848.

[53] Ortolan, Diplomatie de la Mer. Tom. I. p. 219.

[54] Code des Prises et du Commerce, par F. N. Dufriche-Foutaines, Paris, an. xiii. Part II. p. 616. Lebeau, Nouveau Code des Prises, Tom. III. p. 21.

Ordinances[55] to regulate privateering, issued in 1621 and in 1718, that Spanish privateers are required to carry any special flag. The Swedish Ordinance of 1715[56] and the Russian Regulations of 1787[57] are likewise silent upon this head. The Instructions of the President of the United States of America[58], as well as those of the Supreme Director of the United Provinces of South America[59] issued from the Fortress of Buenos Ayres on 15 May 1817, are equally silent. On the other hand, the Danish Prize Instructions issued at Copenhagen on 10 March 1810 announce that those privateers, to which lawful Commissions have been granted, are allowed to carry the Royal Danish Pennant and Ensign with our Royal cypher in the middle of it[60]. It would thus appear that there is no settled Practice of Nations which requires that private ships of war should carry a distinguishing flag, corresponding to the Privateer's Jack, which British privateers are required by the municipal Law of Great Britain to carry, nor any Practice of Nations which forbids private ships of war to carry the pennant or *flamme* which is borne by public vessels of war.

Verification of the military flag of a Privateer.

§ 198. Martens, in his Essay on Privateers[61], observes, that "notwithstanding the species of military flag which Privateers have the privilege of hoisting, they cannot aspire to that exemption from Visitation on the part of foreign Powers, which a Sovereign's ship demands." It seems to be a reason-

[55] D'Abreu, Tratado sobre Pressas de Mar. p. 309.

[56] Robinson's Collectanea Maritima, p. 167.

[57] Lampredi, Du Commerce des Neutres, Paris, ann. p. 359.

[58] Wheaton's Reports, II. Appendix, p. 80. V. Appendix, p. 112.

[59] Wheaton's Reports, IV. Appendix, p. 29.

[60] Wheaton's Reports, V. Appendix, p. 93.

[61] Martens considers the case of merchant ships in cargo, which are furnished with Letters of Marque, in a note to p. 41.

able proposition, that the Commander of every private ship of war should be required to verify his character by exhibiting his Commission of war to the Commander of any public vessel of war, for public vessels of war are authorised by the Law of Nations to maintain the police of the High Seas, and it would be impossible for them to check piracy, unless they were entitled to verify the military character of every private vessel, which they may find acting as a vessel of war. The ordinary instructions issued by the maritime Powers of Europe to their public vessels direct them to capture, as a Piratical vessel, every vessel committing an act of war on the High Seas without a lawful Commission. Thus in "the Regulations established by the King in Council and Instructions issued by the Lords Commissioners of the Admiralty relating to his Majesty's Service at sea," published by authority in 1826, it is declared under the head of Prizes and Prisoners of War, "If any ship or vessel shall be taken acting as a ship of war or privateer, without having a Commission duly authorising her to do so, her crew shall be considered as pirates, and treated accordingly." Similar instructions had been issued to British Naval Officers in 1730 and 1806. The Spanish Ordinance of 1621 and the French Ordinance of 1681 were to a similar purport, as they respectively authorised Spanish and French cruisers to capture any vessel, which they might find cruising without a Commission from some Prince or Sovereign State. The Right of *Visit* for the purpose of ascertaining the lawful character of a cruiser is altogether distinct from the Right of *Search*, and a private vessel of war equally as a public vessel of war may be regarded as exempt from *search*. Such seems to be the fair conclusion to be drawn from the case of the Danish Corvette,

St. Juan[62]. Accordingly, as soon as the Commander of a privateer has exhibited his Commission of War to the Commander of a public ship of war, and the Commission is found to be under the Seal of a Sovereign Prince or State, and to warrant the vessel acting as a vessel of war, it is for the Courts of Admiralty of the belligerent Power to determine, whether any act of war, in which the privateer may have been engaged, is warranted by her Commission and the Law of Nations. M. de Hautefeuille is of opinion that the Law of Nations, as received amongst the Maritime Powers, does not authorise the public ships of war of neutral Nations to verify the military character of private ships by inspecting their Commission; but it seems difficult to reconcile his view with the positive Law of so many maritime Powers, whereby their public vessels are authorised to capture, as pirates, every vessel committing an act of war without a lawful Commission.

A neutral merchant-vessel cannot claim to verify a privateer's belligerent character.

§ 199. M. de Hautefeuille[63] contends that the Master of a neutral merchant ship has a right to require the exhibition of the papers of a privateer to prove its national character, as well as the exhibition of the Commission of its Commander, before he permits any officer from the privateer to board his vessel for the purpose of Visitation and Search; but such a refusal on the part of the Master of a merchant ship to allow an officer of the privateer to board his vessel would be equivalent to resistance, and any resistance whatsoever on his part would according to the Ordinances of all the Maritime Powers fully authorise the Commander

[62] Charles de Martens, Causes Célèbres du Droit des Gens, T. II. p. 183. Ferdinand de Cussy, Causes Célèbres du Droit Maritime des Nations, Tom. II. L. II. c. 8.

[63] Des Droits et des Devoirs des Nations Neutres, Tom. III. Tit. XI. c. 1. s. 1. p. 16.

and crew of the privateer to have recourse at once to force, and to make prize of the merchant vessel. Various regulations have been made from time to time in France for restraining the excesses of private ships of war, and one of the earliest of such regulations forbade them under the most severe penalties to do any violence to vessels, which should lower their sails immediately upon being summoned by an affirming gun to heave to, and should submit to the Visit[63]; but it was an accompanying instruction to private ships of war that they might give chase to any vessel, which they might descry upon the High Seas, and summon it by firing a gun to heave to, and if it should neglect to do so, they might then compel it by force; and if any resistance should be made, the vessel should be declared by the Admiralty to be good Prize. Analogous provisions are found in the French Ordinance of 1681[64], in the Spanish Ordinance of 1718[65], in the Swedish Ordinance of 1715[66], and in one of the most recent of modern Ordinances for the regulation of privateers, namely, the Ordinance which was issued by the Supreme Director of the United Provinces of South America in 1817. This Ordinance provided that a merchant vessel belonging to any Nation whatever, that makes any defence after the privateer's hoisting up her flag, shall be declared good Prize, unless her captain shall prove that the privateer gave him sufficient motive for such a resistance[67]. It seems impossible to maintain with good reason in the face of this and other Ordinances of a cognate character extending over a period of

[63] Edit concernant la juris-diction de l'Amirauté de France, Art. 64. A.D. 1584. Lebeau, Nouveau Code des Prises, I. p. 24.

[64] Ibid. Art. 65.

[65] D'Abreu, p. 320. Art. 13.

[66] Robinson's Collect. Maritim. p. 167.

[67] Art. 28. Wheaton's Reports, Tom. IV. App. p. 35.

three centuries, that the Commander of a privateer can of Right be required by the master of a neutral merchant vessel to show his Commission and Ship's Papers, before he is to be allowed to exercise his belligerent Right of Visit and Search. Besides, the exercise of the Right of Visit and Search by privateers has been a subject of Treaty-arrangements between most of the maritime Powers of Europe; and one object of such Treaty-arrangements has been to regulate the approach of every privateer, so that it shall not come within a certain distance of a merchant vessel at the time, when its affirming gun is fired by way of summons (*la semonce*). To this summons every merchant ship is bound to pay attention and to lay her sails to the mast, and if possible, to anchor. But no provision is found in any of these Treaties, which authorises the master of the neutral merchant ship to demand the production of the Commission of the Commander of the privateer before he submits to the Visit; on the contrary, if any flight is attempted, the privateer may fire into the neutral merchant vessel, and if the neutral merchant vessel should offer resistance and should be captured, she will be good prize, although her neutral character should be afterwards established[68].

The exercise of the Belligerent Right of Visit and Search regulated by Treaties.

§ 200. The mode of exercising the belligerent Right of Visit and Search[69] is of no slight importance in its bearings upon the degree of respect, which is due from every Belligerent Power towards a Neutral Power. A state of War does not authorise the exercise of force on the part of a Belligerent Power against any Power, with which it is at amity; it is only when another Power ceases to be at amity with

[68] Martens on Privateers, p. 58, who cites a long series of Treaties on the subject.

[69] Supr. p. 180.

it, in other words, when it conducts itself as an Enemy, that a Belligerent Power may exercise *jure belli* force against it. The Right of Visit and Search is not a *Natural* Right on the part of a belligerent, as such, against a neutral, as such; it is a *Positive* Right, resting upon custom and tacit compact (*moribus et pacto tacito introductum*[70]), and, as such, is to be exercised according to certain rules. Accordingly we find that no question has been more frequently the subject of Treaty-regulation than the forms to be observed by every Commander of a belligerent ship of war in visiting and searching a merchant vessel sailing under a neutral flag. Private ships of war equally as Public ships of war are empowered by their Instructions to visit and search neutral vessels, and their Commission of war is their sufficient warrant against neutral Powers for exercising such belligerent Rights. It was an invariable provision of such Treaty-regulations, that privateers should fire a blank charge from a gun at a given distance from every merchant vessel, which they intended to visit; and this distance was in some Treaties specified as beyond cannon-shot, in others as within cannon-shot, but in no treaties at a less distance than a half cannon-shot. Thus it was specified in the Treaty of Commerce between Great Britain and France of 1786[71], that all cruisers, whether public or private ships of war, should remain at a distance beyond cannon-shot (*demeureront hors de la portée du canon*), whilst exercising the Right of Visit; on the other hand, in the Treaty of Commerce between France and Russia of 1787 it was stipulated, that no public or private ship of war should approach nearer than a half cannon-shot, whilst exercising the Right of Visit[72]. One

[70] Cf. Part I. § 76.

[71] Martens, Récueil, IV. p. 171.

[72] Il n'est pas moins strictement ordonné aux dits vaisseaux de guerre ou armateurs, de ne jamais s'approcher desdits na-

object of a cruiser's remaining at a reasonable distance on such occasions is to avoid giving rise to any alarm or misgiving on the part of the master of the merchant vessel as to the true character of the cruiser; on the other hand, it will be necessary for the cruiser to remain within such a distance, as will enable it promptly to give support, if required, to the boat's crew, which it may have sent alongside the merchant vessel. According as one or other of these two considerations have preponderated in the minds of the framers of Treaties, the distance at which cruisers are to remain, whilst exercising the Right of Visit, has been enlarged or reduced. Although there may thus be some variations in the stipulations of Treaties as to the actual distance, at which a cruiser is bound to remain after it has fired its affirming gun and whilst its boat's crew goes alongside the merchant vessel, there is a general uniformity in the provisions of such Treaties as to the mode in which the actual visit shall be made, namely, by sending a boat alongside the merchant vessel manned by so small a crew, that its approach can cause no just alarm to the master of the merchant vessel. It was a provision of the Swedish Ordinance of 1715, as well as of the Spanish Ordinance of 1779, that the Commander of a privateer might require the master of a merchant vessel to come with his papers, or to send them by one of his crew on board the privateer, and that if the Commander of the privateer was not satisfied with the papers, he might send some of his own men on board the merchant vessel to inspect still further her documents. But Sweden, in a Treaty of Commerce concluded with the Two Sicilies in 1742[73], agreed that the privateers of either Nation should

vires marchands qu'à la distance au plus de la demi-portée du canon. Martens, Récueil, IV. p. 212.

[73] Wenck, Codex Jur. Gent. Tom. II. p. 137.

not approach nearer to the merchant ships of the other Nation than a cannon-shot, and should send a boat alongside them for the purpose of visit with two or three men on board at most, besides the rowers, and that not more than those two or three men should go on board the merchant vessel. Sweden likewise, in her Treaty with the United States of America in 1783[74], agreed that the respective cruisers of the two Powers should exercise their belligerent Right of Visit at a distance greater than a cannon-shot, and should send a boat alongside with two or three men at most to go on board of the merchant vessel. Spain in like manner, in her Treaty with the United States of America, in 1795[75], agreed that the cruisers of either Nation in exercising their belligerent Right of Visit should remain out of cannon-shot, and should send a boat's crew alongside the merchant ship, out of which two or three men only should go on board the vessel. Spain had agreed to observe the same rules in a Treaty concluded with England in 1667, which was renewed by Art. II. of the Treaty of Versailles, 1783, which latter Treaty was confirmed by the first additional Article to the Treaty of 5 July 1814[76]. There is thus a general concurrence of principle amongst Nations as to the mode, in which the actual Visitation of a neutral merchant ship is to be made by every belligerent cruiser, namely, that it is to be conducted in such a manner as to cause no alarm to the commander and crew of the merchant ship, and at the same time without any hostile demonstration of force; and it may fairly be maintained, that no Commander of a belligerent cruiser can capriciously depart from the established practice without

[74] Martens, Récueil, III. p. 597.

[75] Art. 18. Martens, Récueil, VI. p. 160.

[76] Art. 14. Hertslet's Treaties, II. p. 147.

incurring a responsibility to the Neutral Nation, upon whose Rights of Independence it will have thereby unduly trespassed. It should be borne in mind that it is by the Custom of Nations that the cruisers of a belligerent Power are authorised to visit and search neutral merchant ships on the High Seas in assurance of their good Faith, and that although a Belligerent Power would be justified in regarding a Neutral Power, which should refuse to allow its merchant vessels to be duly visited and searched, as an adherent of the Enemy, and in treating it accordingly, yet the Belligerent is not the less bound in good Faith towards the Neutral to observe those forms, which are of the essence of the Custom, and the observance of which enables a Neutral to recognise the exercise of Belligerent Right in a proceeding, which under any other form would be a Maritime Trespass.

Privateers not admitted to the same Comity as Public Ships of War.

§ 201. The Comity which is extended by the practice of Neutral Powers to the Public vessels of war of a belligerent Power, in admitting them into its ports, is not invariably extended in an equal manner to Private ships of war. It is competent indeed for a Neutral Power to grant free access to its ports to all privateers with their prizes; and if it has granted such access to them, it is not at liberty to interfere with their possession of those prizes, whilst they are within its jurisdiction, unless the capture of them should have involved a violation of the Sovereignty of the Neutral Power. For instance, if a privateer should have entered any port of the Neutral Power prior to making capture of an enemy's ship, and should have augmented her crew in that port without the permission of the Neutral Power, and thereupon should have sailed out and captured a merchant vessel, and brought her as prize of war into a port

of the Neutral Power; or if a privateer should have made capture of a merchant ship within the Jurisdictional waters of a Neutral Power, and brought her prize into a port of the Neutral Power, under such circumstances the Neutral Power may assert its right of Sovereignty, and set the captured vessel at liberty. But Neutral Powers are for the most part accustomed to refuse to privateers all access to their ports with their prizes, unless they should be driven in by stress of weather, when motives of humanity towards both the privateers themselves and their prizes dictate, that they should be admitted. In such cases however the privateers may be required, and are in fact generally required, to put to sea again as soon as the weather will permit. Some Powers have been accustomed to forbid all access to their ports during war to privateers, whether they have prizes or not with them, except under circumstances of necessity; other Powers again have permitted the privateers of a belligerent Power generally to enter their ports, to continue therein, and even to sell their prizes, after sentence of adjudication has been passed in the Prize Courts of the belligerent Power. During the war of the allied Powers against Russia in 1854, all the Baltic and Mediterranean Powers, which remained Neutral, issued Proclamations forbidding privateers to enter their ports, except under stress of weather; and Sweden[77] went so far as to forbid them to stay in her roadsteads. It may be inferred from the practice of Neutral Powers in thus issuing Proclamations, if they see fit, to announce their intention to exclude privateers from the Comity which is exhibited towards Public ships of war, that, unless a Neutral State has so signified its determination to

[77] Edict of 4 April 1854.

refuse to privateers the privilege of asylum within its jurisdictional waters, every belligerent Power is entitled to presume that the usual Comity will be shown to its privateers, and to insist upon their enjoyment of it, subject however to any regulations and limitations, which the Neutral State may choose to prescribe for its own safety or convenience. There are cases indeed in which an independent Power has bound itself by Treaty with another independent Power to admit the privateers of the latter Power with their prizes into its ports, and to refuse to the privateers of the Enemy the like asylum; but such Treaties have been Treaties in the nature of Alliance, such as the Treaty of 1654[78] between Great Britain and Portugal, and the Treaty of 1778 between France and the United States of America[79], and involve a departure from a strict neutrality[80].

Restrictions upon Privateers in neutral waters.

§ 202. It is competent for every Neutral Power in admitting the Privateers of a Belligerent Power into its ports and harbours, to enforce such rules and regulations for their conduct, as to it may seem fit, with a view to maintain the peace of its jurisdictional waters, and to preserve in the interest of the Belligerent Power itself the Right of Neutral Asylum from violation. It may accordingly prohibit a belligerent privateer from lying in wait for the enemy's vessels at the mouths of its rivers or harbours[81], or from leaving its jurisdictional waters in order to attack an enemy's vessel which is approaching them, or from sending out her boats, whilst she is lying within neutral territory, to attack an enemy's vessel which is lying outside of the neutral terri-

[78] Dumont, Traités, Tom. VI. Part II. p. 82.

[79] Martens, Récueil, Tom. II. p. 587.

[80] The Eliza Ann, 1 Dodson, p. 244.

[81] Azuni, Droit Maritime, c. 5. Art. I. Martens, Précis du Droit des Gens, p. 251. The Anna, 5 Ch. Rob. p. 385.

tory[82], or from setting sail in pursuit of an enemy's vessel, which has quitted a neutral port, until after the lapse of twenty-four hours[83], or from attempting to recapture any prize which has been brought into neutral waters by an enemy privateer, or from selling its own prizes in neutral waters before adjudication, or from doing anything to vary its own *status* or that of an enemy vessel, such as may have been the *status* of either at the time of its entering within the jurisdictional waters of the Neutral Power. The Neutral Power is also at liberty to prohibit every belligerent Privateer from enlisting marines or seamen within its ports, or from augmenting its armament, or from taking on board any munitions of war, whilst it is within its jurisdictional waters; but it is the privilege of the Neutral Government, and not of the Enemy-Power, to complain of any contempt of the Sovereignty of the Neutral Power, which is implied in what is technically termed a violation of its territory. Thus Lord Stowell held, that a privateer which was *accidentally* lying in a neutral port, and saw an enemy's vessel approaching it, might go out, and, as far as the enemy was concerned, rightfully capture the vessel, provided this was done beyond the limits of the port[84]. It is competent however at all times for a Neutral Government, if it thinks fit, to prevent by force any privateer from quitting its port for the purpose of attacking another vessel[85] which is in sight. So with regard to Privateers

[82] The Twee Gebroeders, 3 Ch. Rob. p. 164.

[83] Azuni, c. 5. Art. I. Kent's Commentaries, I. p. 123. Lampredi, del Commercio de Popoli Neutrali in tempo di guerra. Parte Seconda, No. XI. where the Regulations of various Italian States are given *in extenso*.

[84] The Vrow Anna Catherina, 5 Ch. Rob. p. 18.

[85] Azuni, c. 5. Art. I. Lampredi, Part II. No. XI.

which have been armed or manned in Neutral ports, their captures on the High Seas would be sustained in a belligerent Court of Prize, notwithstanding they might have violated the Municipal Law of a Neutral Power in order to further the object of their cruise, whilst they were within its jurisdiction, unless the Neutral Power should intervene to put in a claim of Sovereignty over the place of capture; for an Enemy cannot be allowed in a Court of Prize to set up as a bar to the exercise of belligerent Right the privilege of a third party. On the other hand, if any such privateers should have brought their captures within the jurisdiction of the Neutral Power, whose Municipal Law they have so violated, the Courts of the Neutral Power will interpose to restore the captured property to its original owner, on the ground of its capture having been effected by means, which have involved a violation of its Sovereignty. The Courts of the United States of America have repeatedly adjudged property captured under such circumstances to be restored to its original owners, where it has been brought by the captors within the jurisdictional waters of the United States[86]; but they have likewise held that an augmentation of force or an illegal outfit within neutral territory will not affect any capture made after the termination of the original cruise, for which such augmentation or outfit was made[87].

Treaty-Restraints upon neutral Subjects' accepting commissions from belligerent Powers.

§ 203. Under the Common Law of Nations a Belligerent Power may enlist into its military or naval service any individuals whatsoever, notwithstanding they may be the natural born Subjects of other Powers, just as it may invoke the aid of other

[86] The Gran Para, 7 Wheaton, p. 471. The Arrogante Barcelona, 7 Wheaton, p. 496.

[87] The Santissima Trinidad, and the St. Ander, 7 Wheaton, p. 283.

independent Powers to take part with it against its Enemy, and may form alliances with them. The Swedish Ordinance of 1715, as already observed, alludes expressly to the Subjects of Foreign Powers, who may be disposed to accept Swedish Commissions of War; and under the common Law of Nations it is competent to a Belligerent Power to grant Letters of Marque to any person, who may be disposed to apply for them. But in process of time, as the friendly intercourse of Nations came to be cemented by Treaty-engagements in maritime matters, it was found expedient, and became customary, to introduce a provision into Treaties of Commerce, whereby each of the Contracting Parties undertook not to suffer its Subjects to accept Letters of Marque from any Foreign Power, which might be the Enemy of the other Party. One of the earliest instances of such an engagement between two independent Powers is found in the Treaty of Westminster[88] (29 Nov. 1669), concluded between Charles II of England and Frederick III of Denmark.

Art. XXXI. Subditis amborum Regum incolisve Regnorum aut Terrarum illis obedientium licitum non erit ab aliquo Principe vel Statu, cui cum alterutro Fœderatorum discordia aut bellum apertum erit, Litteras Patentes, quas Commissiones vocant, aut Repressalia impetrare, multo minus vi istarum Litterarum subditos alterutrius aliqua molestia aut damno afficere; uterque dictorum Magnæ Britanniæ et Daniæ Regum subditos quisque suos stricte prohibebit ullas ejusmodi Commissiones ab aliis principibus, aut Statibus obtinere vel accipere, sed quantum in ipsis erit, deprædationes omnes vi talium Commissionum fieri omnino vetabit.

In the next following century we find various independent Powers entering into Treaty-engagements under which they agreed to prohibit their

[88] Dumont, Traités, Tom. VII. Part I. p. 129.

subjects from accepting Letters of Marque or Commissions of War from Foreign Powers, under pain of being treated and punished as Pirates. Thus in the Treaty of Commerce concluded between France and the States General[89], on 21 Dec. 1739, it was provided as follows:—

ART. XXXIII. Les sujets des dits Seigneurs Etats Généraux ne pourront prendre aucune Commission pour des armemens particuliers ou Lettres de représailles des Princes et Etats, qui pourroient devenir Ennemis de sa Majesté, ni troubler ou endommager d'aucune manière ses Sujets, en vertu de pareille Commission ou Lettres de représailles, ni même s'en servir pour aller en course, à peine d'être poursuivis et chatiés comme Pirates: ce qui sera pareillement observi par les sujets de sa Majesté à l'égard de ceux des Provinces Unies, et seront à cette fin toutes et quantes fois que cela sera requis de part ou d'autre, dans les terres de l'obéissance de sa Majesté, ou dans les Provinces Unies, publiées et renouvellées défenses très expresses et très précises, de se servir en aucune manière de pareilles Commissions ou Lettres de représailles, sous la peine sus-mentionnée, qui sera exécutée sevèrement contre les Contrevenans, outre la restitution entière de laquelle ils seront tenus envers ceux auxquels ils auroient causé du dommage.

Provisions of a similar character are found in the Treaties concluded between Sweden and the Two Sicilies in 1742[90], between Denmark and the Two Sicilies in 1748[91], between the United Provinces and the Two Sicilies in 1753[92]; and in various Treaties concluded in the course of the eighteenth century between the Christian Powers of Europe and the Ottoman Porte[93]; and between the Christian Powers of Europe and the Dependencies of the Ottoman Porte

[89] Wenck, Codex Juris Gentium, Tom. I. p. 429.

[90] Wenck, Tom. II. p. 136. Art. 23.

[91] Ibid. p. 298. Art. 32.

[92] Ibid. p. 771. Art. 36.

[93] Treaty between the Two Sicilies and the Ottoman Porte in 1740. Wenck, Tom. II. p. 526. Art. 18.

on the Barbary Coast. The object of these latter Treaties was to familiarise the Mahommedan Powers with the principles of Law which regulated the mutual relations of the Christian Powers, and to accustom them to respect them under the sanction of Treaty-engagements. The States of the New World have also in their turn been ready to co-operate in one system of Conventional Law on this subject with the States of the Old World. Thus the United States of America entered into Treaty-engagements prohibiting their citizens from taking Letters of Marque from foreign Powers, with France in 1778[94]; with the United Provinces in 1782[95]; with Prussia in 1785[96]; and with Great Britain in 1795[97], and also with Spain in 1795[98]. Most of these Treaties, with the exception of that with Prussia, the provisions of which on this head were renewed by the Treaty of 1 May 1828[99]; and possibly with the exception of that with Spain, are no longer in force, and their stipulations may have ceased to be obligatory, but their provisions serve to indicate the course, in which the public opinion of the more civilised States of Christendom upon this subject has been steadily advancing.

Municipal prohibitions against Subjects accepting Letters of Marque from foreign Powers.

§ 204. It will have been observed, that by the Treaty of Westminster (29 Nov. 1669), the contracting Parties agreed to prohibit their Subjects from accepting Letters of Marque from any foreign Power against the Subjects of the other Party. The United Provinces had issued such a prohibition to their citizens as far back as 12 May 1611[100]; and

[94] Martens, Récueil, II. p. 597. Art. 21.
[95] Ibid. III. p. 447. Art. 19.
[96] Ibid. IV. p. 45. Art. 20.
[97] Martens, Récueil, V. p. 678. Art. 21.
[98] Ibid. VI. p. 154. Art. 14.
[99] Martens, N. R. VII. p. 619. Art. 12.
[100] Groot Placaat Boek, Tom. I. p. 968.

it appears to have become the rule in the course of the seventeenth century for the European Powers to issue general Ordinances[1] to that effect, or to publish special Edicts at the commencement of any war, in which they desired to remain neutral. Such appears to have been the course adopted by Great Britain in 1677, after the conclusion of the Treaty of Westminster, when it seems to have been thought expedient by the British Government to determine with precision, what were the legal obligations upon the Subjects of the contracting Parties resulting from that Treaty. The following case was accordingly submitted by the Lords of his Majesty's Privy Council forming the Committee of Trade and Plantations to Sir Thomas Exton and Sir Richard Lloyd, two of the most eminent civilians of that period, as appears from the Journal of that Committee[2] of November 1677 :—

It is agreed that the following question be sent to His Majesty's Counsel, learned in the Common and Civil Laws, for their opinion thereupon, viz.

Whether the Kings of England having made alliance, by Treaty and League, with any foreign Prince or Potentate, and thereby agreeing to punish with extreme or utmost punishment such, as by colour of Commissions from Enemies to his said Allies shall take arms against the King's Peace and Treaty proclaimed and spoil the King's Allies, [it] be not a levying a war against the King, and punishable by Death? Or what crime is it, and how punishable?

It is our humble opinion that this is not a levying a war against the King, nor by the Law of the land punishable

[1] Ordonnance de la Marine of 1681, Tit. Prizes, Art. 3.

[2] A copy of this Report is in a MS. book from the library of the late Sir James Marriott, King's Advocate General (1764), in the possession of the author.

by *Death*. It is a crime against His Majesty's Treaties of Peace, and the strict Proclamation he has been pleased to set forth to enjoin the due observance of them. It is also an offence against the Law of Nations, and by the Civil Law it is *crimen læsæ majestatis*. But by the Law of England we do conceive it to be no more than a Conspiracy against His Majesty's Crown and Dignity, and by the Statute for the trial of piracy (28 Henry VIII. c. 15.) punishable only by Fine and Imprisonment; and there is an offender in the Marshalsea who hath accordingly been so punished[3].

THOS. EXTON.
RICH. LLOYD.

Nov. 21. 1677.

Privateers under special conventions Piratical vessels.

§ 205. Such was the view taken by very high authorities in the seventeenth century of the legal character of the offence, which the Subjects of a Sovereign Power commit in accepting Commissions of War from a foreign Prince against a State, which is at amity with their Sovereign, contrary to the express stipulations of existing Treaty-engagements between their Sovereign and that State. It remains to be considered what is the effect of the provisions of subsequent Treaties made in the eighteenth century, under which it has been agreed that the Subjects of either contracting Party should be punished as Pirates, in case they should accept Commissions of war or Letters of Marque against the other Party, whilst it is at amity with their Sovereign. It may be accepted as a sound position of Public Law, that

[3] This opinion is given without the question in Chalmers's "Opinions of Eminent Lawyers," Vol. II. p. 329; from which it appears that the Lords present in the Council Chamber at Whitehall on this occasion were the Lord Privy Seal, Lord Faulconbridge, Marquis of Worcester, Mr. Secretary Coventry, the Earl of Craven, Mr. Secretary Williamson, Mr. Chancellor of the Exchequer.

no person who has a Commission of War from a Sovereign Prince commits piracy under the Common Law of Nations in attacking the subjects of the Power, against which the Commission has been issued. It was however the expressed opinion of Sir Leoline Jenkins[4], in 1675, that the Commander of a privateer, although he had a regular Commission from the King of France, was liable to be treated as a Pirate under the Law of Nations for having exceeded the terms of his Commission; but Bynkershoek[5] has combated this opinion, and Chancellor Kent considers the reasoning of Bynkershoek to be just. Chancellor Kent goes on to observe[6], that if a natural born Subject were to capture property belonging to his fellow Subjects under the authority of a Commission from a foreign Prince, he would upon general principles of Public Law be protected by his Commission from the charge of Piracy; but it will be competent for every Sovereign Prince to declare, that if any of his own natural born Subjects commit any act of hostility against others of his Subjects under colour of any Commission from any Foreign Prince, such offender shall be deemed and adjudged to be a Pirate, and if convicted in his Courts, shall suffer such pains of death and loss of lands and goods as pirates, felons, and robbers upon the sea ought to suffer. Such in fact are the provisions of the English Statute 11 and 12 Will. III. c. 7, and of the Act of Congress of the United States of America passed 7 April 1790, sect. 9. But Municipal regulations in matters over which all Nations have a concurrent jurisdiction, are only operative where the Municipal jurisdiction may be applied

[4] Life of Sir Leoline Jenkins, Vol. II. p. 754.

[5] Quæstiones Jur. Publ. L. I. c. 17.

[6] Commentaries on American Law, Part I. sect. 9. p. 191.

consistently with the general principles of Public Law, to persons who owe allegiance to the Law-making Power. No Power can make an offence to be Piracy within the purview of the Law of Nations[7] by declaring it to be so. To make an offence Piracy, which has not been so considered and treated in practice by all civilised States, it must be so agreed to be by a General Convention amongst all civilised States. Such was the view maintained by Lord Stowell in regard to the African Slave Trade, that although formal Declarations had been made by individual States against that Trade, and Laws enacted by them, and Treaties concluded by them, yet there were other Nations which adhered to the ancient practice under all the encouragements which their own Laws could give it, and that the doctrine of Courts of the Law of Nations relatively to them must be, that their practice is to be respected[8]. With regard therefore to Treaties, under which the contracting Parties have agreed that their subjects or citizens, who may contravene them, shall be punished as Pirates, the obligation of the Treaties is confined to the contracting Parties, and does not extend to any third Party. In the case therefore in which two States, such as the United States and Prussia, are under Treaty-engagements that no subject or citizen of either of the contracting Parties shall accept a Commission or Letter of Marque from a foreign Power against the other Party under pain of being treated as a Pirate, it is obvious that each of the contracting Parties has undertaken not to make any reclamation against the other, if it should punish as Pirates such of its subjects or citizens as may so conduct

Distinction between Piracy under special Convention, and Piracy under the Common Law.

[7] Kent's Commentaries, I. p. 125.
[8] Le Louis, 2 Dodson, p. 210.

themselves. But if the United States should be at war with Austria, and Austria should have granted a Commission or Letters of Marque to a natural born Subject of Prussia, and if an Austrian privateer under the command of such natural born Subject of Prussia should be captured by a United States' cruiser, a complicated question of Public Law might arise, if the United States Government should propose to punish such a person, as a Pirate, against the reclamation of Austria, for Austria will have been no party to the Treaty-engagements between the United States and Prussia; and Austria is entitled by the Law of Nations to grant Letters of Marque to any person who will accept them, and to claim for all parties acting under such Letters of Marque all the *jura belli*, which the Common Law of Nations sanctions. During the war between the United States and Mexico, the President of the United States recommended to Congress to provide by Law for the trial and punishment, as Pirates, of any Spanish subjects, who should be found guilty of privateering against the United States, as by the Treaty of 20 Oct. 1795, it was agreed between Spain and the United States, that, if any person of either Nation should take a Commission or Letter of Marque from a foreign Power against the citizens of the other, he should be punished as a Pirate. Congress accordingly passed an Act on 3 March 1847, declaring it to be Piracy for any subject or citizen of a foreign State to make war upon the United States, or to cruise against their vessels or property, contrary to the provisions of the Treaties existing with that State. Mr. Lawrence has observed, that this Act of Congress is an extension of the crime of Piracy as known to the Law of Nations[9]. It further appears, that on a suggestion

[9] Lawrence's Wheaton, 2d annotated edition, Lond. 1863, p. 254.

that a notice had been given by the United States Government that they would treat as Pirates any foreigners found on board Mexican privateers, the British Minister at Washington was instructed to express to the Government of the United States, that it was the expectation of the British Government that the threat would not be put into execution against any British subject[10]. Other considerations of Law would apply to the case, if Prussia were the Power which, proposed to punish such a person as a Pirate under the provisions of its Municipal Law, for Prussia by the Law of Nations may enforce its Territorial Law against all its natural born subjects, if they come within its jurisdiction.

The general principles of Public Law will continue to govern the cases to which they apply, notwithstanding that the Territorial Law of the State, the Courts whereof are called upon to adjudicate upon such cases, may be altogether at variance with those principles. Thus the Courts of the United States, which would be bound by the Territorial Law of the United States to sentence to death, as a pirate and felon, any citizen of the United States, who should commit any act of hostility against the United States or any citizen thereof under colour of a Commission from any foreign Prince, have held that there is no reason why an Enemy's subject should not have granted to him by the President of the United States a Commission against his own country, as Commander of a privateer. "There is no positive law," observes Mr. Justice Johnson, in delivering the judgment of the Supreme Court, "prohibiting it; and it has been

[10] Hansard's Parliamentary Debates, Series III. Vol. 89, p. 163, 21 Jan. 1847. Lawrence's Wheaton, London, 1863, p. 654.

the universal practice of Nations to employ foreigners, and even deserters, to fight their battles. Such an individual knows his fate, should he fall into the hands of the Enemy; and the right to punish in such a case is acquiesced in by all Nations. But, unrestrained by positive law, we can see no reason why this Government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his National character[11]."

Conventions against the Employment of Privateers.

§ 206. Endeavours have been made from time to time by individual States to discourage the practice of granting Commissions of War to the Commanders of private ships. Thus Sweden and the United Provinces agreed in a Treaty of Commerce concluded at Stockholm on 26 Nov. 1675, "that none of their subjects should be allowed to equip Privateers[12] against the subjects of the other, nor to accept Commissions of War from their respective Confederates; and that each of the contracting Parties would use their best endeavours to persuade their respective Confederates not to grant Commissions to private ships. It appears however from the separate articles of the subsequent Treaty of Peace concluded between these two Powers at Nimeguen on 12 Oct. 1679[13], that the exigencies of war had compelled Sweden to depart from her Treaty-engagements, and to issue Commissions of War to private ships after the example of France, her Confederate in the war, and that the States General at the conclusion of the war demanded and obtained compen-

[11] The Mary and Susan, 1 Wheaton, p. 57.

[12] Quod nemo respective subditorum vel incolarum earum Armaturam Navalem exercere audeat, quam *Commissievaerders* vocant. Dumont, Traités, Tom. VII. Part I. p. 318.

[13] Ibid. p. 432.

sation from the Swedish Government for certain of their Subjects, whose vessels and cargoes had been captured by Swedish Letters of Marque in violation of the Treaty-engagements between the two Powers. No further attempt seems to have been made in this direction until the United States of America claimed a place in the Family of Nations, when a Treaty was concluded between the United States and Prussia on 10 Sept. 1785, which does not appear to have gone quite so far as to bind either Party to renounce the practice of granting Commissions of War to private ships, but only bound each of the contracting Parties in case of war between them not to issue Commissions authorising privateers to commit depredations on the merchant vessels of the other party freighted with innocent cargoes[14]. With regard to a third Power with which either Party might be at war, the continuance of the practice of arming private ships against them was evidently contemplated, and express provisions were made securing to the privateers of either Party a free admission with their prizes into the ports of the other Party. This Treaty was negotiated by Benjamin Franklin, whose real object appears to have been to obtain for private property on the High Seas an immunity from belligerent capture, in cases where it was not of a Contraband character and under transport to an Enemy's country; and the abolition of privateers was one of the means

[14] Tous les vaisseaux marchands et commerçans, employés à l'échange des productions de différens endroits, et par conséquent destinés à faciliter et à répandre les nécessités, les commodités, et les douceurs de la vie, passeront librement et sans être molestés. Et les deux Puissances Contractantes s'engagent à n'accorder aucune Commission à des vaisseaux armés en course, qui les autorisat à prendre ou à détruire ces sortes de vaisseaux marchands, ou à interrompre le commerce. Martens, Recueil, IV. p. 47. Art. XXIII.

through which he hoped to attain to that object. Upon this supposition the policy of the President of the United States, on the recent occasion of the Declaration of Maritime Law made at the Congress of Paris in 1856, involves no departure from the policy of the United States in 1785[15].

Declaration of the Congress of Paris.

§ 207. The Declaration of the Congress of Paris of 16 April 1856, was that "Privateering is and remains abolished[16]." Mr. Lawrence in his last edition of Wheaton's Elements has very justly remarked that this Declaration is only binding upon the Parties to it, and does not constitute Privateering an offence against the Law of Nations. "The Declaration," he says, "is only a pledge on the part of the States adhering to it, not to issue Commissions for that purpose, and does not of itself create any new offence against the Law of Nations; while the admission of the Congress, made at the suggestion of the Russian plenipotentiary, that it would not be obligatory on the signers of the Declaration to maintain the principle of the abolition of Privateering against those, which did not accède to it[17], received a practical construction in the course adopted by England and France, and other countries, in their Declarations with respect to the pending contest in America[18]." As Reciprocity is an implied condition of all Rights and Obligations under the Common Law of Nations, and as the Right of issuing Commissions and Letters of Marque to the Com-

[15] The second annotated edition of Wheaton's Elements of International Law, p. 628, published in 1863, deserves to be consulted on this subject. It has been enriched with various notes by its able editor, Mr. William Beach Lawrence.

[16] La course est et demeure abolie. Martens, N. R. Gén. XV. p. 792.

[17] Protocol No. 23. Martens, N. R. Gén. XV. p. 768. See Appendix.

[18] Lawrence's Wheaton. London, 1863, p. 255.

manders of private ships of war is a Common Law Right, it would seem that the more complete view of the operation of the Declaration of Paris on the Rights and Obligations of the respective Parties to it, would be that it has in no way affected the Common Law Rights and Obligations of any of those Parties towards those Nations, which have not acceded to the Declaration. Accordingly, if Austria were to become involved in war with the United States of America, the Common Law of Nations would regulate the Rights and Obligations of either Power in regard to the use of Privateers, with this difference however, that whilst the United States of America would be at liberty to instruct its privateers to visit, and if there was probable cause, to capture all neutral vessels equally with enemy-vessels, Austria being a party to the Declaration of Paris would be bound to instruct her privateers to refrain from molesting in any way vessels belonging to Subjects of any of the Powers, which have acceded to the Declaration of Paris, inasmuch as the use of privateers as regards the Parties to that Declaration is abolished [19].

[19] The Congress of the United States passed an Act on March 3, 1863, authorising the President in any foreign or domestic war to issue Letters of Marque, but this act was limited to three years, and does not appear to have ever been put in force, notwithstanding that the Confederate States granted Letters of Marque to several private armed vessels.

CHAPTER XI.

ON THE RIGHTS AND DUTIES OF NEUTRAL POWERS.

Views of Grotius as to the relations between Belligerents and Neutrals—Increased importance of the subject in the Eighteenth Century—Bynkershoek's views—Views of Wolff and Vattel—Views of Martens—Perfect liberty of commerce within the territory of a Neutral Power—Distinction between trade on the High Seas and trade within the territory of a Neutral Power—Exceptional *Status* of the merchant on the High Seas—The Political duty of Neutral Nations towards Belligerents—Inviolability of the territory of a Neutral Nation—The Passage of Belligerents through Neutral territory—Hospitality to Belligerent ships discretional on the part of Neutral Powers—Neutral Rights of Police over Belligerent vessels of war in Neutral waters—Right of a Neutral Power to exclude privateers and all prizes of war from its ports—Belligerent privilege of Asylum in Neutral waters—Right of a Neutral Power to allow Belligerent Powers to recruit troops within its territory—Views of the United States Government as to a Belligerent enlisting troops in Neutral territory—Right of a Neutral Power to prohibit the enlistment of troops within its territory.

Views of Grotius as to the relations between Belligerents and Neutrals.

§ 208. GROTIUS in treating of Neutrals in War (*qui in bello medii sunt*) observes, that it may appear superfluous to treat of those, who are not parties to a war, since it is manifest that there are no Rights of war against them. But as upon occasion of war many things are accustomed to be done to Neutrals, especially when they are neighbours, under pretext

of necessity, it may be proper here briefly to repeat what has been said already, (L. III. c. 2. § 10.) that the necessity ought to be extreme, in order to give to a party a right over another's property. That it is further requisite, that the owner of the property should not be under an equal necessity; that if the necessity is evident, more ought not to be taken than is strictly required; that if the bare custody of the thing is sufficient, it is not to be destroyed; and if it be requisite to destroy it, full compensation for it should be made. Having illustrated the application of the above principles by examples of the conduct of Belligerents towards Neutrals, drawn from the records of Greek and Roman history, Grotius proceeds to discuss the duties of Neutrals towards Belligerents. "On the other hand," he says, "it is the duty of those who abstain from war, to do nothing whereby the party who maintains a bad cause may be strengthened, or whereby the operations of the party who wages a just war may be impeded, and in a dubious cause to show themselves impartial by allowing to either party free transit, by supplying their troops with provisions in their march, by not relieving the besieged [1]."

Such is the substance of a brief chapter on the subject of Neutrals in time of War, which was in all probability fully commensurate with the limited importance, which attached to the subject in the early part of the seventeenth century.

Increased importance of the subject in the eighteenth century.

§ 209. To the Publicists however of the eighteenth century the Rights and Duties of Neutral Nations was a subject of greater interest. The Wars of Religion in the seventeenth century had brought

[1] In re vero dubia æquos se præbere utrisque, in permittendo transitu, in commeatu præbendo legionibus, in obsessis non sublevandis. De Jure Belli et Pacis, L. III. c. 17. § 1, 3.

almost all the Maritime Powers of Europe into the battle-field, and in proportion as the area of Maritime Warfare became enlarged, there was a greater tendency on the part of Belligerents to invoke unduly the pretext of necessity, as supplying a warrant of Right on their part to interfere with the commerce of Neutrals on the High Seas. Again, the sanctity of Neutral waters was a question, which involved many considerations of Right in regard to the innocent use of them, which did not have any application to Neutral soil; so that Publicists writing at the time, when the works of Bynkershoek (A.D. 1737) and of Wolff (A.D. 1749) appeared, might be expected to devote to the subject of Neutral Rights and Duties far more attention than they had received at the hands of the philosopher of Delft (A.D. 1625). Vattel, the pupil of Wolff, has devoted still further attention to this subject, and subsequent writers have not failed to enlarge upon it. It has however been reserved for the Judges of the Supreme Court of the United States of America, during the early part of the nineteenth century, to give the fullest and clearest exposition of the Rights of Neutral Nations, as the attitude of Neutrality which the United States maintained during the greater portion of the time, when Europe was arrayed in arms against the military genius of the First Napoleon, required that her Judges should expound the Rights and Duties of Neutrals on numerous occasions, when her Courts were called upon to vindicate the Sovereign Rights of the United States, as a Neutral Nation, against the cruisers of the Belligerent Powers.

Bynkershoek's views.

§ 210. Grotius, in the passage already cited, has made a distinction in the duties of a neutral Nation towards two or more belligerent Nations, according

as Right preponderates in favour of one or the other of the belligerent Parties; but in the system of Grotius the term War is used to designate any state of Contention by Force, (*Status per vim certantium, quâ tales sunt,*) whereas in the system of later publicists War is regarded as a Contention of Right by Force (*juris sui persequendi causa concertatio,*) and the term War is used to denote the state or condition of Nations which prosecute their Right by Force. Under this view of the nature of War it is the duty of Nations, which have determined to take no part in the contention of belligerents, to refrain from showing favour to either Party, irrespective of all question of Right preponderating on the one or the other side; for to show favour to either of them on the ground of Right preponderating on its side would be to prejudge the question of Right, which they have determined to refer to the arbitrament of War as too dubious to admit of being settled by an appeal to Reason. Bynkershoek[2] accordingly observes, in commenting on the passage of Grotius, that "the justice or injustice of a war does not affect a common friend: it is not his business to sit as judge between two friends, and make each of them in turn his enemy, and to give or deny to one or the other more or less, according as he thinks his cause just or unjust. If I am neutral (*medius*) I cannot benefit the one, so as to do an injury to the other. But, a party may say, I will benefit both belligerents alike; I will carry to them both articles of the same character, and it is not my concern if they use them to injure one another." But here, to give the substance of Bynkershoek's further observations, both Reason and Usage intervene and place restraint upon

[2] Quæst. Jur. Publ. L. I. c. 9, § 4. Si medius sim, alteri non possum prodesse, ut alteri noceam.

the intercourse of neutrals with belligerents. It is not consistent with neutrality to convey to either belligerent arms or ammunition or any warlike stores; for to furnish arms to the hands of one of two belligerent parties is to aid him directly in making war against his adversary. "Therefore," he goes on to say, "if we regard each of two belligerent Parties simply as a friend, we may carry on commerce with him, and send to him all articles of merchandise indiscriminately; but if we consider each of them to be the enemy of a friend, we must exclude from our commerce all those articles, from which harm may accrue to a friend in war[3]."

Views of Wolff and of Vattel.

§ 211. Wolff, having discussed the Right of every Nation to abstain by virtue of its Natural Liberty from taking part in a War, which has broken out between other Nations, goes on to say, that Neutral Nations ought to perform towards each of the belligerent Parties the same good offices, which they are bound by the Law of Nations to perform in time of Peace, unless they are bound by an express Convention with one of the Parties to perform or to abstain from performing certain good offices, which may have some reference to War, in which case they are bound to perform or to abstain from performing such good offices equally to both the belligerent Parties. To the same purport Vattel[4], having defined Neutral Nations to be those which in time of War do not take any part in the contest, but remain common friends of both,

[3] Non licet igitur alterutri advehere, ex quibus in bello gerendo opus est, ut sunt tormenta, arma, et quorum præcipuus in bello usus, milites. And again, Optimo jure interdictum est, ne quid eorum hostibus subministremus, quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere. Quæst. Jur. Publ. Univ. L. I. c. 9.

[4] Droit des Gens. L. III. c. 7. § 103, 104.

without favouring the arms of the one to the exclusion of the other, observes that so long as a Neutral Nation wishes securely to enjoy the advantages of her Neutrality, she must in all things show a strict impartiality towards the belligerent Parties. He then proceeds to consider in what consists this impartiality, which a neutral Nation ought to observe. "It solely relates to war and includes two articles. 1. To give no assistance where there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. I do not say 'to give assistance equally,' but 'to give no assistance;' for it would be absurd that a State should at one and the same time assist two Nations at war with each other; and besides, it would be impossible to do it with equality. The same things, the like number of troops, the like quantity of arms, of stores, &c., furnished under different circumstances, are no longer equivalent succours. 2. In whatever does not relate to war, a neutral and impartial Nation must not refuse to one of the Parties on account of his present quarrel, what she grants to the other. This does not deprive her of the liberty to make the advantage of the State still serve as her rule of conduct in her negotiations, her friendly connections, and her commerce. When this reason induces her to give preferences in things which are ever at the disposal of the possessor, she only makes use of her right, and is not chargeable with partiality. But to refuse any of those things to one of the Parties purely because he is at war with the other, and because she wishes to favour the latter, would be departing from the line of strict neutrality. I have said that a neutral State ought to give no assistance to either of the Parties, when under no obligation to give it. This restriction is necessary. We

have already seen [5], that, when a Sovereign furnishes the moderate succour due in virtue of a former defensive alliance, he does not become an associate in the war. He may therefore fulfil his engagement, and yet observe a strict neutrality. Of this Europe affords frequent instances."

Views of Martens.

§ 212. "Perfect Neutrality," says Martens [6], "consists, 1. in abstaining from all participation in the operations of a war; 2. in behaving impartially in regard to everything which may be useful or necessary to the belligerents in respect of the war, either by granting or refusing to the one Party what we have granted or refused to the other, or at least by continuing the same behaviour which we have maintained in time of peace. As long as a Nation satisfies these duties, she has a right to demand to be treated as a friend by each of two Belligerent Parties, and to enjoy the independence which the Law of Nature assures to her, and which she is not obliged to sacrifice to the interests of the Belligerent Parties. But the Natural Rights and Duties of Neutrality being susceptible of modifications, the duties to be performed in case of war, either on the part of a Belligerent Nation towards a Neutral, or on the part of a Neutral Nation towards a Belligerent, may be extended or restricted by Conventions. Hence there results what is termed a Conventional Neutrality, which may apply either to the whole of the dominions of a Power, or only to portions of them, such for instance as the Austrian Low Countries in 1733." Martens then proceeds to consider in detail the rights and duties of Neutrals under three heads: 1. the succours which may be furnished to the Belligerent Parties; 2. the conduct to be observed in

[5] Droit des Gens, L. III. c. 6. § 101.

[6] Précis du Droit des Gens, L. VIII. c. 7. § 306, 307.

regard to the territory of the Neutral Power; 3. Commerce. On the first two of these heads it may be observed, that there is not much divergence either of theory amongst Jurists, or of practice amongst Statesmen in the present day. Thus a Nation may have engaged itself by Treaty to furnish limited succours to another Nation in case that its territory should be invaded by any third Nation; and in practice the fulfilment of such Treaty-engagements has been held to be not inconsistent with neutrality[7]. On the other hand the sacredness of Neutral territory is recognised in all Courts which hold cognisance of questions of Prize of War. It is on the third head of Commerce, that differences of opinion are still found to prevail amongst Publicists, and that disputes in practice still arise between Nations from the tendency of Belligerents to overlook the fact, that the political duty of Nations, which are at peace with all other Nations, does not require them to restrain their Subjects from continuing their customary commerce by reason of war existing between other Nations[8].

Perfect Liberty of commerce within the territory of Neutral Powers.

§ 213. "That an enemy may come into the territory of a Neutral Power, and there purchase and thence remove any article whatsoever, even instruments of war, is a Law of Nations, long and universally established." Such is the language of the Attorney General of the United States in his Report addressed on 20 January 1796[9] to the Secretary of State. Vattel[10] to the same purport writes, "Further

[7] Vattel, L. III. c. 6. § 9, supports this view and combats with great earnestness the opposite view of Wolff, § 736.

[8] Vattel, L. III. c. 7. § 111. De Tastet *v.* Taylor, 4 Taunton, p. 238. Bell *v.* Reid, 1 Maule and Selwyn, p. 727.

[9] Opinions of the Attorneys General of the United States, Tom. I. p. 62.

[10] Droit des Gens, L. III. c. 7. § 110.

it may be affirmed on the same principles, that if a Nation trades in arms, timber for ship-building, vessels, and warlike stores, I cannot take it amiss that she sells such things to my enemy, provided she does not refuse to sell them to me also at a reasonable price. She carries on her trade without any desire to injure me; and by continuing it in the same manner as if I were not engaged in war, she gives me no just cause of complaint." Martens[11] in the same spirit, after observing that the positive Law of Nations has modified some of the principles of Natural Law as regards Commerce, says, that "it does not forbid neutral Powers to sell in their own markets all sorts of merchandise, even munitions of war, to individual purchasers who resort to them." Lampredi[12] likewise, in his Treatise on the Commerce of Neutrals in time of war, in which he has advocated the Rights of Neutral Nations with great moderation and in a very philosophical spirit, observes that "a State cannot be required to renounce any of its Natural Rights against its free will, and that consequently it is only by an express or tacit Convention, that it can be debarred from the Right of selling within its own territory its own productions to whom it pleases, provided that without exception of persons it sells equally to all parties, although they may be the enemies of one another, and shows no favour to one Belligerent in preference to the other." He further proceeds to observe, that "the sale of merchandise within the territory of a Neutral Nation has always been considered to be as free and unassailable as the Sovereignty itself of the Nation. This truth, known by all writers and confirmed by the practice of all Nations, has been developed by us

[11] Précis du Droit des Gens, § 318.

[12] Du Commerce des Neutres, § 5. p. 53. ed. 1802.

in our *Cours du Droit Public*, where we have established in substance, that in virtue of the Conventional Law of Europe Neutrals cannot furnish with impunity to Belligerent Nations articles of direct use in war, remarking however that by the word *furnish* (fournir) we mean *carry* (porter), and that the sale of the same merchandise within the territory of the Neutral to any purchaser, who may present himself, is allowable to Neutral Nations, who in so acting do nothing contrary to Natural Right, or hurtful to any one, so long as they do not show partiality and favour to any of the belligerents in their commercial operations."

Distinction between trade on the High Seas and trade within the territory of a Neutral Power.

§ 214. It is important to bear in mind the great distinction which exists between trade which is carried on within the territory of a Neutral Power, and trade which is carried on within the territory of a Belligerent Power, or upon the High Seas. By the Law of Nations the Sovereignty of an Independent State over its own territory is absolute, and its Laws are binding upon all persons who come within its territory. Such persons become its Subjects *de facto*, whilst they are within its territorial jurisdiction, and it matters not whether the mutual relations of the political communities themselves, of which they may happen to be natural born Subjects, be those of peace or war. The merchant who enters the territory of a Neutral Power is entitled to find an Asylum there from which the arts of peace have not taken their departure, and where amongst those arts of peace, commerce may still be cultivated without fear of any Belligerent wresting merchandise by force of arms from its owner. The Rights of War have no place where the Sovereignty of a Neutral Power prevails; but if the Merchant ventures beyond the confines of Neutral territory, the case is different. Whatever

be his merchandise, if he is an enemy of the Belligerent Power, he is at the mercy of the Belligerent Power whilst he is on the High Seas. If, on the other hand, the Merchant is a Subject of a Neutral Power, the Sovereignty of his Nation does not attend upon him on the High Seas to protect his property from the just application to it of the Rights of War on the part of a belligerent Power.

It is not disputed by any Jurist of note that a belligerent Power may interdict all commerce with the markets of an Enemy by establishing a blockade of his ports; and may confiscate *jure belli* the ship and cargo of any Merchant who, whatever may be his national character, with knowledge of the blockade destines his cargo for a blockaded port. Lord Stowell has pointed out that this practice of confiscation is founded on the necessity of applying a penalty, which will prevent future transgression[13]. This Right of War may be exercised in every place where it does not conflict with the Sovereign Right of a Neutral Nation; and accordingly a Belligerent cruiser may capture a merchant vessel, which is destined to a blockaded port, immediately after she has quitted the Jurisdictional waters of a Neutral Power. So likewise it is not an overstraining of Belligerent Right, if a Belligerent cruiser should capture a merchant vessel, which is laden with munitions of war, destined to an enemy's port, although the port should not be under blockade, as soon as she has begun to navigate the High Seas. The Right of Commerce, although it be a Right of Natural Society, is not a paramount Right; and wherever the Right of Commerce comes into evident conflict with the Right of Self-Defence, which is a paramount Right, the exercise of the former must be subject to

[13] The Lisette, 6 Ch. Rob. p. 387.

restriction. In olden times indeed belligerent Powers claimed an arbitrary Right to prohibit by Proclamation all trade with the ports of the Enemy, and were accustomed to treat, as adherents of the Enemy, all Merchants who should contravene their Proclamation. The Usage of Nations however has intervened in this matter, and shifted the subject from its foundations of arbitrary Right; and by that Usage a Belligerent Power can only interfere with the commerce of Merchants, who are the Subjects of Neutral Powers, when their commerce either supplies the enemy directly with munitions of war, or will defeat the immediate operations of a siege or blockade, whereby the Belligerent seeks to reduce his enemy to terms by cutting off all his supplies.

Exceptional *status* of the Merchant on the High Seas.

§ 215. That an individual citizen of a Neutral State should be liable to be treated as an adherent of a Belligerent Power, whilst the Nation itself, of which he is a member, maintains neutrality, presents no difficulty. War is a great trial of Right, in which all mankind are entitled to take part, if their sense of justice prompts them to side with either party, or their sense of danger compels them to array themselves against either party. On the other hand, a Belligerent is entitled to enlist in his cause all who are disposed to aid him in the prosecution of his Right by force. Whether those who unite with him to support his contention are bound by a tacit or express contract to give him aid, or voluntarily join their force to his force in consideration of fixed pay or contingent booty, is immaterial. All, who take part in the war, are Belligerents; all, who stand aloof from the contention of the Belligerents, are neutral. A Nation, in the sense in which it is the subject of Law in relation to other Nations, is not a Race of men scattered over the face of the globe

according as pleasure or interest may direct the movements of individuals, but it is an Independent Community of men living under a common Government within a given territory, and of which the Governing Power represents the Community in all its relations with other similar Communities. Every member of such a Community, as long as he remains within the territory of the Nation, is subject to the Laws of the Community, and partakes of its independence in the face of other Nations, and the Government is responsible for his conduct towards all persons within its territory. But if an individual member of such a Community quits the territory of the Community, the Community ceases to be responsible for his acts, for he has passed out of the dominion of its laws; and if he enters the territory of another Nation, he becomes *de facto* subject to its Government, and the Government of that Nation in its turn becomes responsible for his conduct towards all persons within its territory. On the other hand, as no Nation has jurisdiction over the High Seas, no Nation is charged with responsibility for the acts of any individuals upon the High Seas *ratione loci*, and it can only be responsible for the acts of individuals *ratione personarum*, where the Government of the Nation has authorised them to act in its name. "Nostri juris interpretes rectius et explicatius docent factum esse publicum, quando deliberatum a legitime congregata universitate est[14]." Hence arises a fundamental distinction between the character of a Public Ship and of a Private Ship. The Commander of a Public Ship has a Commission from the Government of the Nation under whose flag the ship is navigated, and accordingly the Govern-

[14] Albericus Gentilis, De Jure Bell. et Pac. L. I. c. 21.

ment of the Nation is responsible for the conduct of the Commander of a Public Ship *ratione personæ*, wherever that ship may be. The Sovereignty of a Nation is present in the person of the Commander of a Public Ship on the High Seas, just as it is present in the person of the Commander of an army marching through a foreign country, or in the person of a political Envoy who is the bearer of credentials to a foreign Power. But the Sovereignty of a Nation is not present in the person of the master of a Private Ship on the High Seas any more than it is present in the person of a traveller who is sojourning in foreign lands, and who is not directly clothed by any act of his Government with a representative character. Accordingly, as the traveller becomes subject to the Laws of the State wherein he is sojourning, without any conflict thereby arising between the Sovereignty of the State, of which he is a natural born subject, and the Sovereignty of the State, wherein he is sojourning, so the merchant on the High Seas may become subject to the Common Law of the Highway of Nations without any prejudice thereby resulting to the Sovereignty of the Nation, of which he is a citizen. Accordingly, after a Private Ship has quitted the Jurisdictional waters of the State, of which its master and crew are natural born Subjects, they will become amenable to a law which does not bind in any way their fellow Subjects, who remain within the territory of their Nation. Such is in fact the normal state of things in time of peace. For instance, if the master and crew of a ship should attack another ship within the Jurisdictional waters of a State, they are amenable to the Territorial Law of that State; but if they should commit a similar act on the High Seas, they are amenable to a Common Law, which all Nations

may administer, and they may be seized and justified by any Nation whatsoever for a breach of the Common Law of Nations, without the slightest encroachment upon the independence of the Nation, whose natural born Subjects they may be. There is therefore no *a priori* difficulty in supposing that in time of war, the citizens of a Neutral State, when they are on the High Seas, may be amenable to a different Law from that which exclusively prevails within the territory of their State, and that belligerent Nations may enforce the Rights of War against them without encroaching upon the Independence of their Nation. What those Rights of War may be must be gathered from reason and usage. "Jus Gentium Commune in hanc rem non aliunde licet discere, quam ex Ratione et Usu[15]. Reason, to paraphrase the language of Bynkershoek, dictates that if I wish to remain equally the friend of two parties who are enemies, I must prefer neither of them to the other in any matter which has relation to their quarrel. Usage, on the other hand, as may be inferred from an almost perpetual Custom of making treaties and proclamations (*ex perpetua quodammodo paciscendi edicendique consuetudine*) enjoins, that a party who wishes to remain the friend of both Belligerents should not *carry* to either of them arms or other articles of warlike use, and that if such merchandise be taken on its voyage to an enemy's country, it may be confiscated; that with this exception commerce should be free, and all other merchandise be carried with impunity to the enemy.

The Political Duties of Neutral Nations towards Belligerent Nations.

§ 216. A Nation, in its character of a Political Community inhabiting a given territory, has no Political duties towards Belligerent Nations different

[15] Bynkershoek, Quæst. Jur. Publ. L. I. c. 10.

in kind from its duties towards Nations which are at peace with one another. Its duties towards Belligerents may however be said to differ *in degree* from those duties, which it owes to Nations which are at peace with one another. For example, a Neutral Nation is not bound to perform any other good offices towards Belligerent Nations, than it is accustomed to perform towards Nations which are at peace with one another; but if it performs any good offices towards one of two Belligerent Nations, it is bound in the same degree to perform them towards the other Belligerent Nation. A Nation is at liberty to show more or less favour, as it sees fit, to a Nation which is at peace with all other Nations; but it cannot consistently with a state of Neutrality refuse to one of two Belligerent Nations any good offices, which it has accorded to its adversary. The Political duty therefore, which is imposed upon a Nation by a state of Neutrality, consists in its obligation to exercise its Rights of Sovereignty with impartiality towards every Belligerent Nation, and this Political duty is coextensive with the Sovereignty of a Nation. It follows that the limits of the Political duties of a Neutral Nation towards Belligerent Nations are identical with the limits of its Sovereignty; and if any individual citizen of a Neutral State should be guilty of unneutral conduct beyond the limits of its Sovereignty, such conduct cannot be charged upon the Government of the State as a departure from Neutrality. Forfeiture of the goods and ship is the penalty annexed to such acts by the Law of the High Seas in time of War, and, if this were not the case, it would be in the power of individual merchants to involve a Neutral Nation in war against its will.

§ 217. As every obligation under the Common

Law of Nations implies a corresponding Right, the obligation of a Neutral Nation to exercise its Right of Sovereignty with impartiality towards either of two Belligerent Parties implies a Right to enforce its Sovereignty with impartiality against either of them. Accordingly the territory of a Neutral Nation can never be rightfully made the battle-field for settling the disputes of Belligerent Nations, for such a result would be a violation of the Independence of the Neutral Nation, if it were brought about against its will. On the other hand, if the Government of a Nation were to permit a Belligerent to take advantage of its territory for the purpose of attacking his adversary, the Nation itself would forfeit its character of Neutrality. The Rights of a Belligerent Nation, as such, which are founded upon a state of War existing between it and another Nation, can only be exercised by it within its own territory, where its Rights of Empire (*imperium*) are always supreme, or within the territory of its Enemy, whose Empire it is entitled by its Declaration of War to supersede by force, or on the High Seas, or on land which is not under the Empire of any Nation. "Jure belli," says Bynkershoek[16], "adversus hostem duntaxat utimur in nostro, hostis, aut nullius territorio. Sed in territorio utriusque amici qui hostem agit, agit et adversus principem, qui ibi imperat et omnem vim a quocunque factam legibus coercet." So Grotius[17] says of Enemies, "Interfici ergo possunt impune in solo proprio, in solo hostili, in solo nullius, in mari. In territorio autem pacato, quod eos interficere aut violare non licet, id jus non ex ipsorum venit persona, sed ex jure ejus qui imperium habet." All writers accordingly agree that a Neutral Nation

Inviolability of the territory of a Neutral Nation.

[16] Quæst. Jur. Publ. Univ. L. I. c. 8.

[17] De Jure Belli et Pacis, L. III. c. 4. § 8, 2.

may prohibit a Belligerent from attacking his Enemy, whilst he is within the territory of the Neutral Nation. There is not however the same unanimity on the question, whether if the contest shall have been begun on a lawful battle-field, and either of the Belligerent parties should seek to avail himself of the shelter of Neutral Territory, the adverse Belligerent may continue his pursuit, *dum fervet opus*, and capture his antagonist, although he should be at the moment of capture within the territory of a Neutral State. Bynkershoek intimates an opinion of his own in the affirmative, but with many qualifications, and as a view which he did not find to have been countenanced by any other writers[18]. Casaregis, in one of his Discourses[19], advocates a similar view; but he is not consistent in such advocacy, as he maintains a contrary opinion in a later Discourse[20]. D'Abreu, Vattel, Emérigon, Lampredi, Martens, Klüber, and all English and American writers of note, agree in maintaining the doctrine, that if a Belligerent is successful in effecting his retreat into Neutral Territory during a contest with his adversary, the continuance of the contest on the part of his adversary will be a violation of the Sovereignty of the Neutral Power. The Prize Courts of Great Britain, and of the United States, have upheld this view of the Law of Nations by repeated decisions[21], and have invariably ordered the captors to make restitution of every vessel which may have been captured within the Territory of a Neutral Power, if that Power has

[18] Quæst. Jur. Publ. Univ. L. I. c. 8. The Anna, 5 Ch. Rob. p. 385. *d.*

[19] Casaregis de Commercio, Discorso XXIV. No. 2.

[20] Ibid. Discorso CLXXIV. No. 11.

[21] The Anna, 5 Ch. Rob. p. 373. J. F. Soult *v.* L'Africaine. Bee's Reports, p. 204. The Grange. Opinions of the Attorneys General of the United States, Tom. I. p. 15.

itself demanded its restitution[22]. But it is the privilege of the Neutral Power alone to vindicate the outrage against its Empire. "A capture," says Mr. Justice Story, "made within Neutral Waters is, as between Enemies, deemed to all intents and purposes rightful: it is only by the Neutral Sovereign that its legal validity can be called in question, and as to him, and him only, is it to be considered void. The Enemy has no rights whatever, and if the Neutral Sovereign omits or declines to interpose a claim, the property is condemnable *jure belli* to the captors. This is the clear result of the authorities, and the doctrine rests on well established principles of Public Law[23].

The passage of Belligerents through Neutral Territory.

§ 218. A Neutral Nation has the same absolute Right of Sovereignty within its own Territory in respect of Belligerent Nations, as it has in respect of Nations which are at peace with one another. It may accordingly grant a free passage through its Territory to the armed troops of a Belligerent Power without compromising its neutrality, if it is prepared to grant a free passage similarly to the armed troops of the other Belligerent[24]. "An innocent passage," says Vattel[25], "is due to all Nations with whom a State is at peace, and this duty extends to troops as well as to individuals. But it rests with the Sovereign of the Country to judge whether the passage be innocent, and it is very difficult for the passage of an army to be entirely so." "It is to

[22] The Eliza Ann, 1 Dodson, p. 244.

[23] The Anne, 3 Wheaton, p. 446. The doctrine of the British Courts of Prize on this subject is identical with that of the American Courts.

[24] Qui transitum cum exercitu per terras suus petenti concedit, ei, contra quem eodem opus habet, injuriam minime facit. Wolff, § 689.

[25] L. III. c. 7. § 119.

be observed," says Lord Stowell[26], "that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the Neutral State, than on any injustice committed to the third party, who is to be affected by the permission." Grotius[27] and Vattel both agree that it is no ground of complaint, nor cause of war against the intermediate Neutral State, if it grants a passage to the troops of a Belligerent, though inconvenience may thereby ensue to the State beyond; the ground of the right of refusal being the inconvenience that such passage may bring with it to the Neutral State itself[28]. Since therefore the passage of troops and especially of an army is by no means a matter of indifference, he who desires to march his troops through Neutral Territory must apply for the Sovereign's permission[29]. To enter his Territory without his consent, is a violation of his right of Empire, by virtue of which his Territory is not to be employed for any use whatever, without his express or tacit permission. Now a tacit permission for the entrance of a body of troops is not to be presumed, since their entrance may be productive of the most serious consequences. If the Neutral Sovereign has good reason for refusing a passage to them, he is not obliged to grant it, the passage in that case being no longer innocent[30]. With regard however to the passage of the armed vessels of a belligerent Power over what is sometimes termed the Maritime Territory of a Neutral Nation, that is, over those portions of the sea which

[26] The Twee Gebroeders, 3 Ch. Rob. p. 353.

[27] De Jure Belli et Pace, L. II. c. 2. § 13.

[28] Kent's Commentaries on American Law, Tom. I. p. 119.

[29] Qui cum exercitu per terras alterius Gentis iter facere vult, transitum petere debit. Wolff, Jus Gent. § 688.

[30] Droit des Gens. L. III. c. 7. § 119–121.

flow within the distance of three miles from its coast, and over which it exercises a jurisdiction of its own concurrently with the common Maritime jurisdiction of Nations, the case is different[31]. A Nation may forbid the armed fleets of a belligerent Power to enter its ports, harbours, and estuaries, or any of its internal waters; but it cannot rightfully forbid them to pass over the seas which wash its coasts, although it has a qualified jurisdiction over such seas, inasmuch as the passage of ships over such external waters, whether such ships are armed for war or fitted out for commerce, is equally innocent as regards the Nation whose coasts are washed by such waters, for it does not sustain any damage by the passage of them. "It is an observation," says Lord Stowell, "that the passage of ships over territorial portions of the sea, or external water, is a thing less guarded than the passage of armies over land, and for obvious reasons. An army in the strictest state of discipline can hardly pass into a country without the greatest inconvenience to the inhabitants: roads are broken up; the price of provisions is raised; the sick are quartered on individuals, and a general uneasiness and terror is excited; but the passage of two or three vessels, or of a fleet over external waters, may be neither felt nor perceived. For this reason the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of Territory belonging to a Neutral State: permission is not usually required; such waters are considered as the common thoroughfare of Nations, though they may

[31] Grotius holds that a Neutral State may refuse a passage to a Belligerent army, if it is making an unjust war, or brings with it any enemies of the Neutral State, otherwise the right of the Neutral State will be limited to regulating the passage of the Belligerent troops, and requiring hostages for their good conduct.

be so far Territory, that any actual exercise of hostilities is prohibited therein[32].

Hospitality to belligerent ships discretional on the part of Neutral Powers.

§ 219. A Neutral State, by virtue of its Right of Empire over everything within its Territory, may impose such conditions as it pleases upon belligerent vessels which enter its Territory[33]. The circumstance that a vessel belongs to the citizen or subject of a Belligerent State will not disentitle its master and crew from claiming the ordinary rights of hospitality from a Neutral Nation in case of immediate danger from the perils of the sea, or of pressing distress owing to sickness or want of water or provisions. Merchant ships are received in general into the ports of Neutral States without any distinction between those which are the property of the Subjects of Belligerent Powers, and those which are the property of the Subjects of Neutral Powers; but with regard to armed ships, of which the Captain has a Commission of War from a Belligerent Power, and particularly with regard to private ships sailing under Letters of Marque, the hospitality of Neutral States is in practice restricted for the most part to supplying them with articles of pressing necessity. Hospitality to such an extent may be regarded as a common duty of humanity; but it is an act of Comity within the discretion of the Neutral State to allow the armed ship of a Belligerent Power to have free communication with the land (*libre pratique*), or to permit its crew to disembark on its shores. Further, it is competent for the Neutral Power without any disregard of the duties of humanity to require any armed Belligerent ship to continue its voyage, as soon as its pressing necessities have been satisfied. It is by no means a rare event for a Neutral Power to notify publicly the

[32] The Twee Gebroeders, 3 Ch. Rob. p. 352.

[33] Bynkershoek, Quæst. Jur. Publ. L. I. c. 8.

conditions under which the armed ships of Belligerent Powers will be admitted into its ports, and to interdict them from entering certain of its ports, as for instance its military ports. Thus in the war between the three Allied Powers and Russia in 1854, the Swedish and Norwegian Government issued a Circular Notice to the effect that, whilst it conceded to Belligerent ships of war and of commerce permission to enter its ports, it reserved to itself the faculty of interdicting to Belligerent ships of war an entrance into certain ports: to wit, the port of Stockholm, inside of the fortress of Maxholm; the port of Christiania inside of the port of Kaholm; the interior basin of the military port of Horten; the ports of Carlsten and of Carlscrona within the fortifications; and the port of Slito in Gothland inside the batteries of Eneholm. In the exercise of an analogous right of Empire over her own Territory Denmark issued a circular note in the same spirit on 2 April 1854, reserving to herself the right of interdicting Belligerent ships of war and transport ships from entering the port of Christiansoe[34].

Neutral Rights of police over Belligerent vessels of war in Neutral waters.

§ 220. A Neutral State, in permitting Belligerent ships of war to enter within her territorial waters, is bound, if it be within its power, to render their sojourn in those waters safe to them, equally as in granting a passage to their troops over land. She is under an obligation of good faith to render their passage through her territory safe, as far as depends upon her[35]; otherwise to permit the vessels of a Belligerent to enter within her ports or harbours would be to ensnare them[36]. Accordingly, it is the duty of

[34] Circular of the Danish Minister of Foreign Affairs, of 20 April 1854, in Sammlung Officieller Actenstücke in Bezug auf Schiffahrt und Handel in Kriegszeiten. Hamburg, 1854.

[35] Transeuntibus transitus præstandus est tutus. Wolff, § 704.

[36] Vattel, L. III. c. 7. § 131.

a Neutral State not to permit a Belligerent vessel of war, which she has admitted into her internal waters, to be attacked by an Enemy-vessel of war which may subsequently enter them, and at the same time to prevent the vessel which has first arrived from availing itself of the advantage of its position to attack the last comer. Further, it is competent for a Neutral State, by virtue of its Right of Sovereignty over every person and thing which is within its territory, to detain a Belligerent vessel of war which has entered into any of its ports subsequently to another vessel which belongs to an Enemy, so as to secure that the latter shall not suffer prejudice from having entered into the port of a Neutral Power. A practice in this matter has become established amongst the European Powers to require every Belligerent vessel of war to allow an interval of twenty-four hours at least to elapse before it can sail out of a neutral port in pursuit of an Enemy vessel, which has quitted the port since its arrival; and this practice has been adopted, as a rule of the Law of Nations, by the States of the American Continent[37]. The rule has further been incorporated into the provisions of various Treaties which regulate the intercourse of the Christian Nations of Europe and America with the Mahommedan Powers of Africa[38]. A striking example[39] of the manner, in which this rule is accustomed to be enforced, occurred in the month of December 1759, when a British fleet had entered the port of Cadiz, whilst a French vessel of

[37] Instructions to the Collectors of Customs, 4 Aug. 1793. Jefferson's Letters to M. Genet, 8 and 17 June 1793. Kent's Commentaries, I. p. 123.

[38] Treaty between the United States and Morocco, 25 Jan. 1787. Martens, Récueil, IV. p. 247. U. S. and Tripoli, 4 Nov. 1796. Id. p. 299. U. S. and Tunis, 28 Aug. 1797. Id. VI. p. 405.

[39] Ortolan, Règles Internationales, Tom. II. p. 249.

war, the Fantasque, was lying at anchor. The Governor of Cadiz immediately sent a requisition to the British Admiral to allow the Captain of the French vessel the option of sailing out at least twenty-four hours before the departure of the British fleet; and Admiral Broderick at once acceded to the requisition of the Governor. An instance of this rule having been enforced by the King of Spain in the previous century is furnished by a Royal Ordinance of 18 June 1653, issued on the occasion of hostilities between the English and Dutch [40].

Azuni [41] has set forth at length the regulations of Police, which Neutral Nations have from time to time thought fit to enforce against Belligerent vessels of war, which have taken advantage of the Asylum of Neutral waters.

(1) Privateers and all vessels of war ought to observe peace and perfect tranquillity towards all parties, and particularly towards the subjects and ships of their enemies, even if the latter should be privateers or vessels of war.

(2) Privateers and vessels of war are forbidden to increase the number of their crew by receiving on board any seaman of any Nation whatever, without excepting even their fellow citizens, who may have been enrolled for military service.

(3) They may not augment the number or calibre of their guns, nor the quantity of their ammunition.

(4) They may not keep sentinel in the port, nor seek to procure information about the vessels which

[40] This Ordinance is given *in extenso* in D'Abreu, Tratado Juridico-Politico sobre Pressas de Mer, Cadiz, 1746, c. 4. p. 62. A Règlement of the Republic of Genoa on this subject, issued in 1779, will be found in Martens, Récueil, Tom. III. p. 67. The rule of twenty-four hours was enforced by the British Government in the case of the U. S. ship Tuscarora and the Confederate Steam Ship Nashville in the port of Southampton Jan. 29, 1862.

[41] Droit Maritime, Tom. I. c. 5. p. 409.

are likely to touch there. In case that they descry any of them, they are not to sail out of port for the purpose of attacking them: if they should do so, they may be fired at from the batteries and ships of war in the port, and compelled to return.

(5) They may not set sail after an enemy's ship has tripped her anchor: they ought to allow at least an interval of twenty-four hours to elapse between its departure and their own. After this interval has elapsed, if the enemy-ship is still in sight of the port, a belligerent vessel ought to delay its departure until the other vessel is out of sight and the direction of its course cannot be known.

(6) They may not place themselves in ambuscade in bays or gulfs, nor hide themselves behind promontories, or small islands which are dependencies of the neutral mainland, in order to watch for and give chase to enemy-vessels. They ought not to trouble in any manner the approach of vessels, of whatever Nation they may be, to the ports or coasts of a Neutral Nation.

(7) They may not, during all the time that they are within the ports or territorial seas of a Neutral Nation, employ force or stratagem to recover prizes which may be in the power of an enemy, or to deliver their fellow citizens who may be their prisoners.

(8) They may not proceed to the sale or redemption of prizes made by them, before a legal judgment has established their validity.

The foregoing rules may be traced through a long series of Ordinances, which have been published from time to time, as occasion called for them, by various Neutral Powers. It is not however incumbent on a Neutral Power to enforce the police of its own Territory against the Subjects of a Belligerent Power,

further than may be requisite to afford protection to the Subjects of the adverse Belligerent, whilst they are under the Sovereignty of the Neutral Power.

Right of a Neutral Power to exclude Privateers and all Prizes of war from its ports.

§ 221. It is by no means unusual for a Neutral State to refuse to the Privateers of a Belligerent Power all access to its internal waters. Thus during the war between the Allied Powers and Russia in 1854, the King of Sweden and Norway issued an Ordinance on 24 March 1854, whereby it was provided that no foreign Privateer should be allowed to enter any Swedish port or to sojourn in its roadsteads. Such prohibitions however are not in practice interpreted so strictly, as to deny to Privateers a refuge within Neutral waters from the attack of an enemy, or from perils of the sea. Thus even in cases where a State has entered into Treaty-engagements[42] to exclude Privateers belonging to the enemies of the other contracting Party from all commerce with its Subjects, an exception is usually made in favour of the duties of humanity being shown to such privateers, if they should be in distress. It is also perfectly competent for a Neutral State to Prohibit by Proclamation or otherwise the Public vessels of Belligerent Powers, as well as Privateers, from bringing their prizes into its ports. In the silence however of a Neutral State on this subject, a Belligerent Power is entitled to presume that its armed vessels may freely enter the ports of the Neutral State with their prizes and prisoners, and that they will be at liberty to depart with them unmolested.

There appears to have been a time when Jurists were disposed to maintain, on the theory of the detention and custody of prisoners of war being a

[42] Treaty of 6 Feb. 1778 between the United States of America and France. Martens, Récueil, II. p. 597. Treaty of 19 Nov. 1794 between the United States of America and Great Britain. Ibid. V. p. 682.

continuation of hostilities, that such prisoners were entitled to be set free, if they were brought within Neutral waters, although they were not landed on the shore of the Neutral State. Bynkershoek[43] however has pointed out, that in such a case, when the capture is completed, a state of lawful possession is established, which a third Power cannot disturb consistently with impartiality. There can be no doubt that according to the usage of Nations, if an armed ship under the flag of a Belligerent Power has been admitted into the harbour of a Neutral Power without notice of any intention on the part of that Power to interfere with the custody of its prizes or its prisoners, it would be inconsistent with Neutrality for the Government of the Neutral Power to set those prizes or prisoners at liberty. But if, on the other hand, the prisoners should have escaped to land without any interference on the part of the Neutral Power, they will have escaped out of the possession of the Belligerent Power, and the Neutral Power will equally be called upon to maintain their state of freedom, as it was before called upon to maintain their state of captivity.

A question of this kind arose in the course of the war between the Allied Powers and Russia in 1854, on occasion of a British vessel of war entering the Bay of San Francisco, in the State of California, in company with a Russian prize, the Sitka, in charge of a British prize-crew. On 25 Nov. 1854, a petition was presented to a Court of Municipal Law at San Francisco on behalf of two Russian seamen, alleging

[43] Apud eos, qui utrinque simpliciter amici sunt, status rerum hominumve nostrorum non mutatur, cum nulla sit mutandi causa. Unde miror Gentilem aliosque existimasse, postliminio reverti, quæcunque in non hostis imperium delata sunt, et quod ei consequens est, captivos in territorium amici deductos, fieri liberos. Quæst. Jur. Publ. Univ. L. I. c. 15.

that they were unlawfully detained on board the Sitka by the prize-master and crew, and praying for a writ of *Habeas Corpus*, directed to such master and crew. The Court thereupon granted the writ, which was duly served upon the prize-master, who thereupon immediately got the Sitka under weigh, and sailed out of the jurisdiction of the State of California. Upon the question being referred to the Federal Government, the Attorney General of the United States reported, that the conduct of the prize-master constituted no just cause of complaint on the part of the United States under the Law of Nations, or under any Treaty between the United States and a Foreign Power[44].

Belligerent privilege of Asylum in Neutral Waters.

§ 222. The following propositions contain the views of the Government of the United States of America as to the privilege of Asylum within Neutral Waters. They were issued in 1855 and accord with the practice of the European Powers:—

1. Belligerent ships of war, privateers, and the prizes of either are entitled on the score of humanity to temporary refuge in Neutral Waters from casualties of the sea or war.

2. By the Law of Nations Belligerent ships of war, with their prizes, enjoy Asylum in Neutral ports for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the Neutral Sovereign, who may refuse the Asylum absolutely, or grant it under such conditions of duration, place, and other circumstances, as he shall see fit, provided that he be strictly impartial in this respect towards all the Belligerent Powers.

3. When the Neutral State has not signified its determination to refuse the privilege of Asylum to

[44] Opinions of the Attorneys General of the United States, Tom. VII. p. 123.

Belligerent ships of war, privateers, or their prizes, either Belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations and limitations as the Neutral State may please to prescribe for its own security.

4. The United States have not by Treaty with any of the present Belligerents bound themselves to accord Asylum to either, but neither have the United States given notice that they will not do it, and of course our ports are open for lawful purposes to the ships of war of either Great Britain, France, Russia, Turkey, or Sardinia.

5. A foreign ship of war, or any prize of hers, in command of a public officer, possesses in the ports of the United States the right of extra-territoriality, and is not subject to the local jurisdiction.

6. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by Habeas Corpus issuing from Courts either of the United States or of a particular State.

7. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the Belligerent and the Neutral State.

Right of a Neutral State to allow Belligerent Powers to recruit troops within its Territory.

§ 223. It is competent for every Independent State to allow the agents of a Foreign Power to enlist persons within its Territory for its military or naval service, and such conduct will be consistent with Neutrality so long as a State does not permit any Belligerent Power to do so, and refuse the like permission to its adversary. It was the common practice of the European Powers in the fourteenth century to carry on their wars with the aid of foreign mercenaries; and it was not until the fifteenth century, that Treaties of Alliance were introduced amongst the European Powers, in which there were

stipulations, that each of the contracting Parties should restrain its Subjects from taking part against the other contracting Party, in case it should be involved in war with a third Power. Thus in the Treaty concluded in 1467[45] between Edward IV of England and Henry IV of Castile, it was agreed that neither Ally should allow his Subjects to engage in any war against the other; and in the Treaty concluded in 1270–1[46] between Henry VI of England and Louis XI of France, it was agreed that neither Monarch nor the Subjects of either should engage in hostilities, either for their own quarrels or for the quarrels of others. Similar stipulations occur in other Treaties of alliance during the fifteenth century, and in numerous Treaties of Alliance concluded in the sixteenth century, to which England, France, Spain, and the Emperor, were respectively parties. It is a necessary inference from the provisions of these and other Treaties, that the Common Law of Europe at that time did not impose upon a Power, which was desirous to observe Neutrality, the duty of restraining its Subjects from individually taking part in a war between Foreign Nations, and that the foundation of such a duty, when it arose, was *alliance*, and not simple *neutrality*. Such also is the inference to be drawn from the provisions of the Treaty of Munster, concluded in the middle of the seventeenth century (1648) between France, the Emperor, and the Electors, Princes, and States of the Holy Roman Empire, whereby it was agreed "that none of the contracting Parties should under any title or pretext supply the enemies of the other Parties with arms, money, soldiers, or provisions, or receive the troops of any such enemies into their territory, or allow them to encamp

[45] Dumont, Corps. Diplom. Tom. III. Part I. p. 589.
[46] Ibid. p. 601.

or permit them to pass through it," all of which acts are, under the Common Law of Nations perfectly consistent with Neutrality. So far indeed was it from being regarded at any time by the Nations of Europe as inconsistent with the Neutrality of a State, that any of its natural born Subjects should serve under the standard of a Foreign Power in a war against another Foreign Power, that there are on record numerous Conventions concluded by France, Spain, the Holy See, and Naples respectively with the Helvetic Cantons, under which the latter have engaged themselves to furnish those Powers with a certain number of troops, or to allow those Powers to recruit a certain number of troops within their territory, and not to recall such troops whilst those Powers should be at war[47]. The employment of Swiss mercenaries has only been discontinued by Naples and the Holy See within a very recent period. Great Britain on the other hand had Conventions in the last century with various German Powers, and more particularly with the Landgrave of Hesse Cassel[48], under which she had German mercenaries in her pay, whom she employed in her foreign wars by the side of her native troops.

Views of the United States Government as to a Belligerent enlisting troops within Neutral Territory.

§ 224. The views of the Government of the United States as to the right of a Neutral Power to grant or refuse, as it sees fit, permission to a Belligerent Power to enlist troops of land or sea within its Territory are contained in a State Paper issued from the Attorney-General's office in the month of October 1855, on occasion of certain agents of the British Government enlisting soldiers within the Territory of the United States.

[47] The Treaty between France and Switzerland of 1521, which was the model for numerous subsequent Treaties between the same Powers, will be found in Dumont, Corps. Diplom. Tom. IV. Part I. p. 333.

[48] Martens, N. R. II. p. 422.

1. It is a settled principle of the Law of Nations, that no Belligerent can rightfully make use of the territory of a Neutral State for Belligerent purposes without the consent of the Neutral Government.

2. The undertaking of a Belligerent to enlist troops of land or sea in a Neutral State without the previous consent of the latter is a hostile attack on its National Sovereignty.

3. A Neutral State may, if it pleases, permit or grant to Belligerents the liberty to raise troops of land or sea within its Territory, but for the Neutral State to allow or concede the liberty to one Belligerent and not to all would be an act of manifest Belligerent partiality, and a palpable breach of Neutrality.

4. The United States constantly refuse this liberty to all Belligerents alike, with impartial justice, and that prohibition is made known to the world by a permanent Act of Congress.

5. Great Britain, in attempting, by the agency of her military and civil authorities in the British North American provinces, and her diplomatic and consular functionaries in the United States, to raise troops here, committed an act of usurpation against the Sovereign Rights of the United States.

6. All persons engaged in such undertaking to raise troops in the United States for the military service of Great Britain, whether citizens or foreigners, individuals or officers, except they be protected by diplomatic privilege, are indictable by Statute.

Right of a Neutral Power to prohibit the enlist-

§ 225. Bynkershoek[49] considers that the Common Law of Nations does not impose upon a Neutral State any obligation to prohibit the agents of a

[49] Bynkershoek, Observationes Jur. Publ. L. I. c. 22.

ment of troops within its Territory.

Foreign Power, which is at war with another Foreign Power, from enlisting men within its Territory to serve in its army or navy, but that the Neutral State has the right, if it thinks fit, to prohibit all such raising of men for warlike purposes within its Territory, inasmuch as it has a paramount right to require the services of all persons within its Territory for the purposes of its own defence, if war should arise. It is accordingly the privilege of a Neutral State at all times, and not the privilege of a Belligerent Power arising out of a state of War, to determine whether it is fit that the Subjects of the Neutral State should be prohibited from quitting its Territory to take service under the standard of a Foreign Power. "As the right of levying soldiers," says Vattel[50], "belongs solely to the Nation or the Sovereign, no person must attempt to enlist soldiers in a foreign country without the permission of the Sovereign." Hence it is competent for the Government of a Neutral Nation, if it sees fit, to forbid by proclamation or other public notice the agents of any Foreign Power, in time of war equally as in time of peace, from recruiting men for its army or navy within its territory. Wolff[51] has correctly pointed out that it is an offence against the Supreme Majesty of a State for any individual to levy soldiers within its territory without its consent, and that if a stranger so acts, he will be amenable to punishment under the Territorial Law of the State. "Quoniam nemini in alieno territorio militem conscribere licet invito superiore, si quis legere audet, *jus Gentis* violat, ac ideo injuriam eidem facit, cumque injuria hæc crimen sit a peregrino commissum, peregrini autem in territorio alieno delinquentes juxta leges loci puniendi

[50] Droit des Gens, L. III. c. 11. § 15.
[51] Jus Gentium, § 754.

sint, si peregrinus in territorio alieno invito superiore militem legere audet, deprehensus puniri potest." To a similar effect the Supreme Court of the United States of America has held[52] that a Neutral Nation, may, if so disposed, without any breach of her Neutral character, grant permission to both Belligerents to equip their vessels of war within her territory. But without such permission the Subjects of such Belligerent Powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such Neutral Nation. Such unauthorised acts violate her Sovereignty and her Rights as a Neutral. All captures made by means of such equipments are illegal in relation to such Nation, and it is competent to her Courts to punish the offenders, and in case the prizes taken by them are brought *infra præsidia*, to order them to be restored.

[52] Brig Alerta *v.* Blas Moran, 9 Cranch, p. 365.

CHAPTER XII.

ON THE RIGHTS AND DUTIES OF NEUTRAL POWERS, CONTINUED.

Trade within the Territory of a Neutral State—Purchase and sale of Ships by the Subjects of Neutral Powers—Sale of Ships of War by a Neutral Power—Modified Neutrality under Treaty-Engagements—Non-interference with trade consistent with the Neutrality of a State—The Policy of the United States of America, as a Neutral Power, to interdict certain branches of trade—Trade, unless interdicted, not a violation of the Sovereignty of a Neutral State—Jurisdiction over Captures in Neutral waters exercised by the Neutral Power—Ancient jurisdiction exercised by Neutral Powers in matters of Prize—Neutral Courts do not entertain the question of Damages—A Neutral Power may claim a vessel, captured in violation of its Territory, before a Belligerent Prize Court—Neutral Powers do not interpose their jurisdiction in cases of Rescue—Conflict of jurisdiction between a Neutral Admiralty Court and a Belligerent Prize Court—Duties of a Neutral Power in cases of Civil War—Belligerent Right of Capture reconcilable with the Independence of Neutral Powers.

Trade within the Territory of a Neutral State.

§ 226. Merchants, who are the subjects of Foreign Powers, when they seek to exercise commerce within the Territory of an Independent State, are subject to the absolute Sovereignty of that State, unless their commerce should be carried on under Treaty-engagements of a special character between the Sovereign to whom they owe Natural allegiance, and the Sovereign in whose ports they seek to exercise commerce.

Every Independent State is accordingly entitled to make laws for the regulation of the trade of foreign merchants in its ports, and it is competent for it to allow or to forbid to foreign merchants all trade in certain articles within its Territory. This absolute right of every Independent State to regulate the commerce of foreign merchants, who frequent its ports, is not affected by the circumstance that other Nations are at war with one another, further than that, if it wishes to observe a state of Neutrality between the Belligerent Nations, it must allow or forbid equally the Subjects of either Belligerent Nation to trade within its Territory; and that if it does allow the subjects of either Belligerent Power to trade in its ports, it is essential to the maintenance of its character, as a friendly State, to protect them in their trade. It is immaterial for the purposes of Rightful commerce within the Territory of a Neutral State, what may be the nature of the articles in which merchants seek to trade, provided they are not prohibited as objects of commerce by its Laws. Whether they are weapons which are suitable for the purposes of the chase or for the purposes of war; whether they are ships which are suited to carry cargo or to carry guns, is perfectly immaterial, if commerce in such articles is part of the customary trade within the ports of a Neutral State. Vattel considers the commerce of arms and ships to be no exception to the general commerce which every Power may permit to be carried on within its Territory[1], consistently with a State of Neutrality. "If a Nation," by which Vattel means the domiciled Subjects of a Nation, "trades in arms, timber for ship-building, ships, and warlike stores, I cannot take

[1] L. III. c. 7. § 110.

it amiss, that it sells such things to my enemy, provided it does not refuse to sell them to me also at a reasonable price. It carries on its trade without any design to injure me, and by continuing it in the same manner, as if I were not engaged in war, it gives me no just cause of complaint. In what I have said above, it is supposed that my enemy goes himself to the Neutral country to make his purchases. Let us discuss another case, *that of Neutral Nations resorting to my enemy's country for commercial purposes.* It is certain that as they have no part in my quarrel, they are under no obligation to renounce their commerce for the sake of avoiding to supply my enemy with the means of carrying on the war against me. Should they affect to refuse selling me a single article, while at the same time they take pains to convey an abundant supply to my enemy, with an evident intention to favour him, such partial conduct would exclude them from the Neutrality which they enjoyed. But if they only continue their *customary trade,* they do not thereby declare themselves against my interest; they only exercise a right which they are under no obligation of sacrificing to me[2]." Accordingly a Neutral Power does nothing incompatible with Neutrality in allowing its Subjects to carry any articles whatsoever of commerce to markets within the Territory of a belligerent Power, nor is it required by the Common Law of Nations to exercise its Right of Sovereignty over strangers who frequent its markets, in order to prevent the exportation of any articles which they may have purchased in its markets. On the contrary, although it may be competent for an Independent State to deny to all Na-

[2] Cf. Tastet *v.* Taylor, 4 Taunton, 238. Bell *v.* Reid, 1 Maule and Selwyn, p. 727.

tions the liberty of carrying on trade in a particular article of merchandise within its Territory, if the motive of such denial should be to impede the military operations of one of the belligerent Powers, and to favour the other, it is manifest that such conduct would be a breach of Neutrality[3].

Purchase and Sale of Ships by the Subjects of Neutral Powers.

§ 227. That there is nothing in the Law of Nations which requires a Neutral Power to prohibit its Subjects from selling armed vessels to a Belligerent, was very carefully laid down by Mr. Justice Story, in delivering the judgment of the Supreme Court of the United States on the subject of the equipment of an armed vessel called the Independencia del Sud, which had been fitted out by some merchants of the United States in the port of Baltimore, and sent to Buenos Ayres for sale, where she was purchased by the *de facto* Government of Buenos Ayres, at that time engaged in war with Spain. The question came before the Supreme Court on appeal from the Circuit Court for the district of Virginia, in which the owners of certain cargo captured by the Independencia del Sud and the Altravida claimed that their property, which had been brought *infra præsidia* of the United States, should be restored to them, on the ground that the equipment and sale of the Independencia del Sud was a breach of the Neutrality of the United States. "It is apparent," said Mr. Justice Story, "that although equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, Contraband indeed, but in no shape violating our Laws or our National Neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize for being

[3] Opinions of Attorneys General of the United States, Tom. I. p. 61.

engaged in a traffic punishable by the Law of Nations. But there is nothing in our Laws, or in the Law of Nations, which forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no Nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of Contraband. Supposing therefore the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale, there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made by the vessel after the sale was, for that cause alone, illegal[4].

The above judgment proceeds upon the assumption that by the Law of Nations an armed ship, although it be the private property of a Neutral merchant, may be captured by a Belligerent cruiser on the High Seas as Contraband of War; if it be destined to an enemy's port for sale; but that if it has arrived in an enemy's port, a Neutral merchant may lawfully sell it, just as he may lawfully sell a cargo of arms and munitions of war, which he has safely transported over the High Seas to an enemy's market. In accordance with this view we find numerous treaties, in which it is stipulated that ships of war which are being carried to an enemy, shall be liable to capture and confiscation. Thus in Art. XI[5] of the treaty of friendship between Charles II of England and Charles XI of Sweden (anno 1661), it is provided that no merchandise called Contraband, and especially no money, nor provisions, nor arms,

[4] The Santissima Trinidad and the St. Ander, 7 Wheaton's Reports, p. 283.

[5] This Treaty was renewed by Art. XI of the Treaty of Orebro, 1812. Hertslet's Treaties, Tom. I. p. 328.

nor cannon, &c.; "as also no *ships* of war or convoys be supplied or carried to the enemy, without peril, in case they be taken, of being adjudged lawful prize, without hope of restitution." So likewise in the treaty between Denmark and Great Britain, signed at Copenhagen on 11 July 1670[6], it is provided that the contracting Parties shall not aid or furnish the enemies of either Party, that shall be aggressors, with any provisions of war, as soldiers, arms, engines, guns, *ships*, or other necessaries for the use of war, nor suffer any to be furnished by their Subjects; but if the Subjects of either Prince shall presume to act contrary hereunto, then that King, whose Subjects shall have so done, shall be obliged to proceed against them with all severity, as against seditious persons and breakers of the league." Numerous other treaties might be cited in which *ships* are classed in the same category with money, troops, ammunition, arms, and provisions, as articles which are not to be sent to the enemy. Amongst these may be more particularly noticed a treaty concluded between Charles I of England and the United Provinces (17 Sept. 1625), in which ships are enumerated amongst those articles of merchandise which are Contraband of War.

"Toutes merchandises de contrebande, comme sont munitions de bouche et de guerre, *Navires*, armes, voiles, cordages, or, argent, cuivre, fer, plomb, et semblables, de quelque part qu'on les voudra *porter* en Espagne et aux autres Pays de l'obeissance du dit Roi d'Espagne et de ses adherens, seront de bonne prise avec les Navires et Hommes qu'ils porteront[7]."

It is competent for a Neutral Power to allow the

[6] This Treaty was renewed by Art. XIII of the Treaty of Kiel, 1814. Hertslet's Treaties, Tom. II. p. 187.

[7] Dumont, Traités, Tom. V. Part II. p. 480.

Subjects of a Belligerent Power to sell ships which are within its ports, even when such ships have been captured from the enemy, provided that the rightful possession of the captors has been affirmed by the sentence of a competent Prize Tribunal. A Neutral Power does nothing incompatible with a state of Neutrality in permitting a Belligerent to transfer his rights of property over a ship within its territory to a Neutral merchant. But when a vessel, which has been sold by a Belligerent in a Neutral port, ventures out of the jurisdiction of the Neutral Power, she ceases to be under its protection and becomes amenable to the Rights of War; and it is the practice of some of the European Powers to refuse to recognise, if they happen to be Belligerents, the sale of any ship by the Enemy to a Neutral merchant after war has commenced, on the ground of such a sale being in fraud of the Belligerent's Rights against the property of the Enemy. The practice of the French tribunals under the Prize regulations of 23 July 1704[8] and 26 July 1778[9] is to refuse to recognise as Neutral Property any vessel of Enemy-build, or which has ever been Enemy-owned, unless the sale of it to a Neutral merchant has taken place before the commencement of hostilities. The British Prize Courts on the other hand recognise such a sale as a valid transaction of commerce, if it be *bonâ fide*, and the Enemy's interest has been entirely divested. Lord Stowell held this doctrine repeatedly, and Dr. Lushington, during the war between the Allied Powers and Russia in 1854, observed, in reference to a vessel which had been purchased from a Russian ship-owner by a merchant of Hanover, "that if the *bonâ fides* of the sale be assumed, it is not to be denied that it

[8] Lebeau, Code des Prises, Tom. I. p. 287.
[9] Ibid. Tom. II. p. 61.

is competent to Neutrals to purchase the property of Enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no Belligerent Right can override it[10]." The United States of America[11] have in a similar manner maintained the Right of any citizen of the United States to purchase a foreign ship of a Belligerent Power, and this anywhere, at home or abroad, in a Belligerent port or in a Neutral port, or even upon the High Seas, provided the purchase is *bonâ fide*, and the property be passed absolutely and without reserve.

Sale of Ships of War by a Neutral Power.

§ 228. It has never been a subject of complaint on the part of a Belligerent against a Neutral Power that the latter has permitted an Enemy of the former to effect the sale of a vessel in the course of trade within its ports. But it may reasonably be a subject of complaint on the part of a Belligerent Power against a Neutral Power, if the latter should itself purchase from an Enemy an armed ship which had taken refuge in its ports, or if the latter should itself sell to an Enemy-Power, or to its agents, any vessels of war lying within its waters. The distinction between such a transaction on the part of a Neutral Power, and a similar transaction on the part of a Subject of such Power in the ordinary course of commerce, is obvious. Trade is not the normal occupation of a Sovereign Power in the sense in which it is the business of a merchant; and although, whilst general peace prevails, a State may put on the character of the Merchant without injury thereby resulting to any other State, and may freely sell or buy articles of immediate use in war, it is difficult for it

[10] The Johanna Emilia, 1 Spinks's Eccl. and Adm. Reports, p. 321.

[11] Letter of Attorney General Cushing of Aug. 7, 1854, to Mr. Secretary Marcy. Opinions of the Attorneys General of the United States, Vol. VI. p. 652.

to enter into the *arena* of commerce in time of war, and to sell its surplus stores of arms or its surplus ships of war with the best of faith to one of two Belligerent Powers without inflicting an injury upon the other Belligerent. Thus in 1825, whilst Spain was engaged in war with her revolted Subjects in Mexico, the Swedish Government put up six Public vessels of war for sale, which were purchased by the Swedish house of Michaelson and Benedicks, which transferred them to the English house of Barclay, Harring, Richardson, and Co., of London, who were the financial agents of the Revolted Colonies. There was no doubt that this purchase had been made for the account of the Insurgents, and the Spanish Secretary of Legation, M. D'Alvarado, was instructed by his Government to make a representation to the Swedish Government, and to press it to cancel the sale of the ships, alleging that Spain had no doubt of the good faith of Sweden, but that the latter had been deceived into an act of disloyalty by the agents of the Insurgents. Sweden for a long time hesitated to exercise her Rights of Sovereignty over the vessels which were still within her ports, but the Envoys of several of the European Powers having supported the remonstrances of Spain, Sweden ultimately consented to cancel the sale of three of the vessels, which were still lying in Swedish ports. M. de Cussy[12], in commenting on the above transaction, remarks, that "the original sale of the vessels was in itself without doubt a purely commercial transaction on the part of the Swedish Government, divested of all political motive, and as such perfectly legitimate; but that as soon as it was shown that the vessels were in all probability destined for the use of the Insurgents,

[12] Phases et Causes Célèbres par Baron Ferdinand de Cussy, du Droit Maritime des Nations Tom. II. p. 402.

the Swedish Government could not consistently with Neutrality refuse to exercise its jurisdiction over the vessels which were still within Swedish waters, and to prevent them sailing out to join the naval forces of the Mexicans. A similar distinction has been made between the act of a Neutral Power in supplying a Belligerent vessel of war with coals out of the Government stores, and the act of a Neutral Power in allowing merchants resident within its Territory to supply, in the customary course of their trade, coals to a Belligerent vessel. Coal is an article *ancipitis usus*, and as such may be supplied freely by Merchants within the jurisdiction of a Neutral Power in the course of their trade[13], but for a State to furnish supplies of it to a Belligerent vessel of war out of the Government stores has been held to be inconsistent with the Neutrality of the State[14].

Modified Neutrality under Treaty-engagements.

§ 229. A Nation may contract Treaty-engagements with another Nation, binding itself to exercise in a certain manner its Rights of Sovereignty within its Territory, in case the other contracting Party should be involved in war; for instance, that it will not allow the vessels of war of the Enemy an asylum within its waters, except they should be in a state of distress, or that it will not allow a free passage across its territory to the Enemy's forces, or that it will not allow Enemy-merchants to purchase munitions of war in its markets, or that it will not allow its own Subjects to furnish arms or warlike stores to the Enemy. The fulfilment of such Treaty-engagements will not be inconsistent with the Neutral Character of a Nation, if it should deny to both of two Belligerent Parties that liberty of commerce,

[13] Circular Despatch of the British Secretary of State for the Colonies of Nov. 15, 1851.

[14] Despatch from the British Secretary of State for the Colonies to the Governor of Bermuda. Papers relating to Foreign Affairs presented to Parliament, 1862.

which it has bound itself by Treaty to refuse to one of them. Thus Great Britain had entered into Treaty-engagements[15] with Spain, in 1814, not to allow any British subject to furnish arms, ammunition, or any other warlike articles, to the Insurgents in America. In 1819 the Revolted Colonies had succeeded in establishing their Independence *de facto*. The insurrection thenceforth took the character of a war between a Government *de jure* and a Government *de facto*. The British Government had already in 1817, in order to observe Neutrality, and at the same time to give full effect to her Treaty-engagements with Spain, issued a Proclamation prohibiting the exportation of arms and munitions of war to Spain as well as to her Insurgent Colonies, but it being open to doubt, whether the existing Statute Law applied to the service of Powers, which were not acknowledged amongst the Family of Nations, the British Parliament, in deference to the arguments of Lord Castlereagh and of Mr. Canning[16], armed the Executive Government with full authority, under 59 Geo. III, c. 69, commonly called the Foreign Enlistment Act, to prevent the enlistment of troops or the arming of vessels to be employed in the service of any person or persons exercising the powers of Government *de facto* in any Country, equally as of any acknowledged Power. The British Government accordingly took advantage of the powers conferred upon them by British Law to prevent the enlistment of troops and the equipment and armament of vessels in British Ports to be employed in the service of either Belligerent Party against its enemy, as the only measure whereby the Crown of Great Britain

The Foreign Enlistment Act.

[15] Additional Articles to the Treaty of Friendship and Alliance between Great Britain and Spain, 23 Aug. 1814. Martens, N. R. IV. p. 122.

[16] Hansard's Parl. Debates, XL. p. 367, 904, 1102.

could at once observe its Treaty-engagements with Spain, and maintain a state of Neutrality between the Belligerents. At a later period however, when war was imminent in 1823 between Spain and France, the British Government determined not to enforce the provisions of the Foreign Enlistment Act, as, although the enforcement of its provisions would have been sounding to Neutrality, it would have in fact operated most partially in favour of France. An Order in Council was accordingly issued, removing the prohibition to export arms and munitions of war from British ports to Spain. Mr. Canning[17], in defending the conduct of the British Government on this occasion, observed, "It was in order to give full and impartial effect to the provisions of the Treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the Act of 1819 declared that the prohibition should be mutual. When however, from the tide of events, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, we must either extend to France the prohibition which already existed with respect to Spain, or we must remove from Spain the prohibition to which she was at present subject; provided we meant to place the two countries on an equal footing. As far as the exportation of arms and ammunition was concerned, it was in the power of the Crown to remove any inequality between the Parties simply by an order in Council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was taken off. By this measure His Majesty's Government afforded a guaranty of their *bonâ fide* Neutrality. It is obvious that the mere appearance

[17] Hansard's Parliamentary Debates, N.S. VIII. p. 1050.

of Neutrality might have been preserved by the extension of the prohibition to France instead of by the removal of the prohibition from Spain; but it would have been a prohibition in words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory."

Non-interference with trade consistent with the neutrality of a State.

§ 230. In reviewing the opposite lines of conduct which Great Britain pursued on the above occasions, with a view to maintain a state of Neutrality, a question suggests itself, whether it is more consistent with that *bonâ fide* impartiality which becomes a Neutral State, for her to prohibit both Belligerents from trading in her ports during the continuance of their hostilities, or to permit them both to enjoy equal facilities of trade as in time of peace? Circumstances may occur, in a period of general peace, which will warrant a State in prohibiting the exportation of any warlike stores from her ports; as, for instance, if she have reason to expect that she may herself be soon involved in war. And considerations of a like nature may equally warrant a State in prohibiting the exportation of any warlike stores from her ports at a time when war exists between other States. No Neutral State is responsible to any Belligerent State for measures which she feels called upon to adopt for her own security within the limits of her own Sovereignty. On the other hand, it is the privilege of every Neutral Nation, as such, to maintain relations of peace with both Belligerents, and either Belligerent may justly expect that a Neutral Nation will not prohibit any trade within its ports, whenever such prohibition would clearly work a greater prejudice to one Belligerent than to the other, and so be indirectly an act of favour to the latter. Sir W. Scott[18]

[18] The Eliza Ann, 1 Dodson, p. 244.

has observed, "If a Sovereign has shown more favour to one side than to the other—if he has excluded the ships of one of the Belligerents from his ports and hospitably received those of the other—he cannot be considered as acting with the necessary impartiality. I do not think a country, showing such an invidious distinction, entitled to claims in the character of a Neutral State. The high privileges of a Neutral are forfeited by the abandonment of that perfect indifference between the contending parties in which the essence of Neutrality consists." It would seem then that a Belligerent Power, as such, has no right to call upon a Neutral Power to exercise its rights of Sovereignty within its own Territory in any other manner than in time of peace, provided the Neutral Power is acting with impartiality towards the Belligerent Power and its adversary. It is a less questionable act therefore for a Neutral Power to allow its markets to be open equally to the Subjects of both Belligerent Powers, than to prohibit to both parties the exportation of provisions, or ammunition, or arms, or ships, or any other article available for Belligerent purposes. A Nation may, indeed, in appearance, act with impartiality in issuing and enforcing such prohibitions, whilst in substance it may be favouring the one party more than the other. For instance, a war may arise between two countries, one of which in time of peace exports arms and imports provisions, whilst the other exports provisions and imports arms; in other words, between two countries, one of which is highly advanced in manufacturing industry, whilst the other is strictly agricultural. It is obvious that a Nation will not act with impartiality towards both Belligerents, if it should prohibit the exportation of arms and allow the exportation of provisions. Again,

one Belligerent may be in want of ships, and the other Belligerent may be in want of horses. It will evidently not be consistent with a State of Neutrality for a State to allow a free commerce to both Belligerents in horses within its ports, and to prohibit a free commerce in ships, if her subjects in time of peace are accustomed to trade freely with foreign merchants in ships and in horses. On the other hand, if a State does not impose any restraints upon commerce within her Territory during a period of warfare between other Powers, but affords to the Subjects of either Belligerent free access to her markets, and if it should happen that the one Belligerent derives from commerce in her ports more advantages than the other Belligerent, she may justly allege, that if her continuing to allow free access to her markets to the Subjects of both Belligerent parties equally as to the Subjects of other Nations operates more beneficially to one of the Belligerent parties than to the other, it is by reason of the alteration of their mutual relations towards each other, over which she has no control, and not by reason of any alteration in her conduct towards either of them. Any change which a Nation may make upon war breaking out between other Nations, by interdicting the commerce of either of them in her ports, may expose the good faith of a Nation to question, whenever the change operates more prejudicially against the one than against the other of the two Belligerent parties. On the other hand, the maintenance of an order of things which existed prior to the war, against which no complaint was raised in time of peace by any other Nation, cannot expose a neutral Nation to any imputation of bad faith towards either of two Belligerent parties.

§ 231. "The United States of America," as ob-

served in a judgment of the Supreme Court in 1817[19], "instead of opening their ports to all the contending parties, when at peace themselves (as may be done, if not prevented by antecedent Treaties), have always thought it the wisest and safest course to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments." The United States first adopted this policy, as a Neutral State, in 1794[20], when M. Genet, the French Minister at Washington, was endeavouring to work upon the sympathies of the States for the purpose of involving them in war with Great Britain, and they have persevered in the same policy down to the present day. Thus the Act of Congress of 1818, although it does not prohibit armed vessels fitted out by citizens of the United States from sailing out of their ports, requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign Powers at peace with the United States. Accordingly, when Denmark remonstrated against the Government of the United States allowing a steam vessel of war, which had been purchased by the Government of the German Empire, at that time engaged in war against Denmark, to leave the ports of the United States, the United States Government refused to permit the vessel to quit its waters, until a bond had been executed in compliance with the Act of Congress of 1818, that the vessel should not be employed to cruise or commit hostilities against any State, with which the United States were at peace[21]. On the other hand, "the Laws of the United States do not forbid their citizens to sell

The Policy of the United States of America, as a Neutral Power, to interdict certain branches of trade.

[19] The Estrella, 4 Wheaton, p. 448.

[20] Waite's American State Papers, Vol. I. p. 89.

[21] Annuaire des Deux Mondes, 1852–53, p. 485. Lawrence's Wheaton, second annotated edition, p. 95. Editor's note.

to either of the Belligerent Powers articles Contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although, in so doing, the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of National Neutrality, nor of themselves implicate the Government." Such was the purport of the message delivered by the President of the United States on 31 December 1854[22], and in the following month of October 1855 an Official Declaration on the same subject was issued from the office of the Attorney-General, the legal organ of the Government of the United States[23]. "It is no departure from Neutrality," is the language of this Declaration, "for the citizens of a Neutral State to sell to belligerents gunpowder, arms, munitions, or any other articles of merchandise Contraband of war, or for the merchant ships of a Neutral State to transport the troops or military munitions of either Belligerent. Such commerce is perfectly lawful in itself, subject always to the chances of hostile capture by the other Belligerent; and in the present war, supplies of gunpowder or other articles Contraband of war, and military transportation, have been furnished of Lawful Right by citizens of the United States, to each of the Belligerents, but more especially and in larger proportions to Great Britain and to France." To the same effect President Pierce had observed, in the message above cited, that "during the progress of the present war in Europe our citizens have, without National responsibility therefore, sold gunpowder and arms to all buyers, regardless of the destination

[22] Message of President Pierce. Annuaire Hist. Universel, 1855, App. p. 211.

[23] Sammlung der Officieller Actenstücke, &c., Hamburg, 1855. Neue Folge, II. p. 22.

of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and France in transporting troops, provisions, and munitions of war to the principal seat of military operations, and in bringing home the sick and wounded soldiers; but such use of our mercantile marine is not interdicted either by the International, or by our Municipal Law, and therefore does not compromise our Neutral relations with Russia."

Trade, unless interdicted, not a violation of the Sovereignty of a Neutral State.

§ 232. A distinction must always be kept in mind between acts of civil life within the Territory of a Neutral Nation which violate its Right of Sovereignty, and acts which do not violate it. No transaction of commerce between Belligerent merchants or between a Belligerent merchant and a Neutral merchant, entered into or completed within Neutral Territory, is an offence against the Sovereignty of the Neutral Nation, unless it should be forbidden by its Territorial Law. All offences against the Law of a State committed by any person whatsoever within its Territory are offences *læsæ majestatis*, and may be punished by the State as such, unless the offender be the subject of a foreign Power, with which there are Treaty-engagements in restraint of the independent action of the State in such matters. A particular transaction of commerce equally with any other act of civil life may be forbidden by the Law of a State, as, for instance, the sale of a freeman into slavery, and all parties within the Territory of that State, who should be engaged in such a transaction of commerce, would be guilty of an offence against its Sovereign Power. It is immaterial with regard to the binding force of the Law of a State whether there is a state of War beyond its Territory or not, and whether the parties within its Territory, who may infringe its Law, are Subjects of a Belligerent or of a Neutral State. For

instance, to enlist for military service the Subjects of an Independent Prince within his Territory, without his permission, is a violation of his Rights of Sovereignty. Accordingly, if a foreign vessel of war should enter the harbour of an Independent State, and its Commander should enlist any of the Subjects of that State to serve on board his vessel, without the license of the Sovereign Power, it would be a violation of the Sovereignty of the State, and accordingly the augmentation of the force of a Belligerent vessel of war in the harbour of a Neutral State without the license of the Sovereign Power will be a breach of the Law of Nations. It has therefore been held by Courts which administer the Law of Nations, that such an unlawful augmentation of the force of a Belligerent vessel of war in the port of a Neutral Nation will infect every capture made during the voyage, upon which she is engaged, with the character of a Maritime *tort*, which the Neutral Nation is empowered to redress, if the Belligerent vessel should bring any capture within the Territory of the Neutral Nation. A question of this kind came before the Supreme Court of the United States, on appeal from the District Court of Virginia, in reference to the cargo of a Spanish vessel, which had been captured by two Belligerent cruisers commissioned by the *de facto* Government of Buenos Ayres. Although the independence of Buenos Ayres had not at such time (April 1817) been recognised by the Government of the United States, the existence of a Civil War between Spain and her Colonies had been recognised by it, and each party was deemed by it to be a Belligerent Nation, having, so far as concerned the United States, the Sovereign Rights of War, and entitled to be respected in the exercise of those Rights. One of the Belligerent cruisers, which had

effected the capture of the Spanish vessel, came into the port of Virginia, and there, with the consent of the Custom-house Authorities, landed for safe keeping a quantity of property which had been taken out of the captured vessel. The original Spanish owner of this property, through the medium of the Spanish Consul at Norfolk, thereupon commenced proceedings in the District Court of Virginia for the recovery of his property, as having been captured under circumstances, which involved a violation of the Neutrality of the United States. Two pleas were relied upon by the claimants as justifying restitution: 1. that the Belligerent cruiser had been originally equipped, armed, and manned as a vessel of war in the ports of the United States; 2. that there had been an illegal augmentation of the force of the Belligerent vessel during her cruise, whilst she was in a port of the United States.

The Court dismissed the first plea in a few words. "It is apparent," said Mr. Justice Story, "that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, Contraband indeed, but in no shape violating our Laws, or our National Neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as good Prize for being engaged in a traffic prohibited by the Law of Nations. But there is nothing in our Laws, or in the Law of Nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no Nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fidè* sale, (and there is nothing in the evidence before us to contradict this,) there is

no pretence to say that the original outfit on her voyage was illegal, or that a capture made after the sale was, for that cause alone, illegal." But on the second plea the Supreme Court held that, as it was proved that during the stay of the Belligerent cruiser in the port of Baltimore she had enlisted thirty persons, there was an illegal augmentation of her force by a substantial increase of her crew, and that such an augmentation of her force was not merely an infraction of the Municipal Law of the United States, subjecting the offender to personal penalties, but was a violation of the Law of Nations, infecting all captures made during the cruise. "It has never been held," says Mr. Justice Story, "that an augmentation of force or an illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violation of Public Law, the offence may be well deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this Court has long been established, that such illegal augmentation is a violation of the Law of Nations, as well as of our own Municipal Laws, and as a violation of our Neutrality, by analogy to other cases, it infects the captures subsequently made with the character of *torts*, and justifies and requires a restitution to the parties who have been injured by the misconduct. It does not lie in the mouth of wrong-doers to set up a title derived from a violation of our Neutrality. The cases in which this doctrine has been recognised and applied have been cited at the bar, and are so numerous and so uniform that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported[24]."

[34] The Santissima Trinidad and the St. Ander, 7 Wheaton's Reports, p. 348.

The offence of violating the Territory of a Neutral Nation by enlisting seamen within its ports to man a Belligerent vessel, without the previous consent of the Sovereign Power of the Nation, has been held by the Supreme Court of the United States[25] not to be purged by the discharge of her crew in a foreign port, if the same crew has been re-enlisted in that port, and the vessel has thereupon proceeded to sea, and made captures under the commission of a Belligerent Power. Under such circumstances, the Supreme Court held that the discharge of the crew was a colourable transaction, and that a Neutral Power was justified in enforcing its Neutrality by the restitution of the prizes made by the Belligerent vessel, when those prizes had been brought within the Neutral Jurisdiction. The same Court[26] has held that the sale of a vessel in a Belligerent port to the Belligerent Government was a colourable sale, insufficient to purge the offence of a breach of Neutral Territory, where an interest in the prizes made by the vessel could be traced as still attaching to the parties, who had committed the offence. The Courts of the United States appear, from a long series of decisions, to hold it to be the Right of the Courts of a Neutral Nation to require from Belligerents as strict proof of *bonâ fides* on their part, in matters involving a violation of its Neutrality, as the Courts of Belligerent Powers require from Neutrals in matters involving a violation of their Belligerent Rights, and that every Neutral Power is entitled to refuse the use of its Territory for any Belligerent purpose, and to vindicate its refusal by restoring all prizes made in violation of

[25] The Gran Para, 7 Wheaton, p. 471.

[26] The Monte Allegre and the Rainha de los Anjos, 7 Wheaton, p. 520.

its Territory, if they should be brought by the captors within its Territory.

Jurisdiction over captures in Neutral waters exercised by the Neutral Power.

§ 233. The principle upon which the Courts of the United States, sitting as Courts of a Neutral Nation within Neutral Territory, have claimed to exercise a Jurisdiction over Prize of War, has been lucidly set forth by Mr. Justice Washington. "The general rule," he observes[27], "is undeniable, that the trial of captures made on the High Seas, *jure belli*, by a duly commissioned vessel of war, whether from an Enemy or a Neutral, belongs exclusively to the Courts of that Nation to which the captors belong. To this rule there are exceptions, which are as firmly established as the rule itself. If the capture be made within the territorial limits of a Neutral country, into which her prize is brought, or by a privateer which has been illegally equipped in such Neutral country, the Prize Courts of such Neutral country not only possess the power, but it is their duty, to restore the property so illegally captured to the owner. This is necessary to the vindication of their Neutrality. A Neutral Nation may, if so disposed, without a breach of her Neutral character, grant permission to both Belligerents to equip their vessels of war within her territory. But without such permission, the subjects of such Belligerent Powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such Neutral Nation. Such unauthorised acts violate her Sovereignty, and her rights as a Neutral. All captures by means of such equipments are illegal in relation to such Nation, and it is competent to her Courts to punish the offenders; and in case the prizes taken by them are

[27] The Brig Alerta and Blas Moran, 9 Cranch, p. 364.

brought *infra præsidia*, to order them to be restored." Traces of the exercise of this Jurisdiction on the part of Great Britain, as a Neutral Power, are found in the writings of Sir Leoline Jenkins[28], who was Judge of the High Court of Admiralty of England in the reigns of Charles II and James II. In a letter written on 5 Dec. 1665, after hearing what was alleged on both sides, he advises his Majesty in Council to decree restitution of the St. Anne of Ostend, which had been brought into Dover by a Portuguese Privateer, on the ground that the Privateer had set out from Dover manned for the most part with British subjects, and hovered off that port, in violation of the protection and safeguard, which your Majesty's authority affords to strangers coming upon their lawful occasions towards any of your Majesty's Harbours or Ports. On another occasion[29], (11 Oct. 1675,) when a French Privateer had captured a merchant vessel belonging to the port of Hamburg, within one of the King's Chambers, the same learned Judge advised his Majesty in Council that the Hamburger being taken in one of his Majesty's Chambers, and being bound to one of his Majesty's ports, ought to be set free. Other instances of the restitution of vessels, which had been captured in violation of Neutral Territory, will be found amongst the judgments of this eminent Civilian, who was at the same time very careful[30] not to encroach upon the clear and undoubted Rights of War of Belligerent cruisers. The Right of a Neutral country, according to the modern practice of Nations, to take cognisance of Prize of War, when there

[28] Life of Sir Leoline Jenkins, II. p. 727.

[29] Life of Sir Leoline Jenkins, II. p. 780.

[30] Letter to the King upon the judgment of the Court of Admiralty at Dublin, 5 Jan. 1679–80. Life, II. p. 783.

has been an infringement of its Territory, has been incidentally recognised by Lord Stowell[31]; but there are no cases to be found in the Reports of the proceedings of the English Courts of Admiralty in modern times, in which this question has been directly raised and decided.

Ancient Jurisdiction exercised by Neutral Powers in matters of Prize.

§ 234. It seems at one time to have been generally held to be within the competency of the Admiralty Court of a Neutral Nation to take cognisance of all captures made on the High Seas of the property of its own Subjects by Belligerent vessels, if the captors should have brought their prizes into its ports. The Ordonnance de la Marine of Louis XIV (art. XV) directs, that if on board of prizes brought into French ports by foreign armed vessels, there shall be found goods belonging to the Subjects of France or its allies, the goods so belonging to French Subjects shall be restored. Valin says, that this Right is exercised in favour of Subjects by way of compensation for the asylum granted to the captor and his prize; but he expressly states that the rule does not extend to the goods of allies[32]. According to the opinion of Sir Leoline Jenkins[33], it was in accordance with the General Law of Nations in the seventeenth century for the Admiralty Court of a Neutral Nation to order the restitution of goods belonging to its citizens, if they had been captured by a Belligerent on board an enemy vessel, and the latter should have been brought by the captor within the jurisdiction of the Neutral Nation. Thus, he observes, in the case of a Spanish ship taken by a Portuguese frigate, which had brought her Prize into a British port, "The last question is, (for I do not

[31] The Fladoyen, 1 Ch. Rob. p. 144.

[32] 2 Valin, Comment. p. 274. Traité des Prises, c. 7. p. 176.

[33] Life of Sir L. Jenkins, vol. ii. pp. 732, 780.

find anything material made out against the validity of the Portuguese Commission,) in the case of your Majesty's subjects, Sir Arthur Ingram and the Canary Company, to whom a third part of the lading belongs, whether their goods shall be Prize in this Spanish bottom. 'Tis certain they are relievable upon the General Law; and whatever became of the Biscayer, the English goods might and ought to be taken out, and restored to the owners." On another occasion (11 Oct. 1675) the same learned Judge, after advising the restitution of a Hamburger ship captured by a French Privateer in an English Chamber, proceeds to say, "The last question is, whether the Englishmen should have such goods as belong to them in property taken out of the Prize, and restored to them here, or else be forced to go to France to claim and recover them. It is my opinion they should be forthwith taken out and restored, they making full and clear proof of their property that they were and are upon their own account and risk (as some have already done in the Admiralty), and purging themselves by oath that they do not claim or colour anything belonging to the Hamburgers, for where the thing in contention is within your Majesty's Jurisdiction, there justice ought to be administered, and nowhere else. And I do humbly conceive that the French Privateer hath the less pretence for a Renvoy into France, because the Law is the same in that country." M. Théodore Ortolan[34], in treating of the Right of Neutral Asylum, after discussing the cases of illegal capture within Neutral Waters, and the case of illegal equipment within Neutral Territory, goes on to say, "Les Règlements particuliers de quelques Puissances y ajoutent un autre cas; celui où la prise a été faite sur les propres

[34] Diplomatie de la Mer, Tom. II. L. III. c. 8. p. 265.

sujets de l'Etat Neutre, sous prétexte de Contrebande de guerre ou de toute autre cause dans des conditions, qui aux yeux de cet Etat la rendent illégitime." If indeed it should be alleged that a capture has been made without lawful Commission, or fraudulently and piratically under pretext and colour of Belligerent Right, Neutral Admiralty Courts may without doubt entertain jurisdiction under the Law of Nations for the purpose of enquiring into the Right of the captor to make capture on the High Seas; but if it be established that the captor is lawfully commissioned by a Belligerent Power, and has seized the ship and goods *jure belli*, the trial of Prize or no Prize cannot, according to the modern practice of Nations, be adjudicated by the Admiralty Court of any Neutral Nation, but belongs exclusively to the Courts of the Power to which the captor belongs. The general doctrine, that the trial of Prize belongs exclusively to the Courts of the State to which the captor belongs, is now too firmly settled to admit of doubt," is the language of Mr. Justice Story[35]. In the great argument respecting the Silesian loan, it is laid down in emphatic terms, that "the proper and regular Court for these condemnations is the Court of that State to which the captor belongs[36];" and that in this method, by the Courts of Admiralty acting according to the Law of Nations and particular Treaties, all captures at sea have immemorially been judged of in every country of Europe." The exemption in favour of the Admiralty Courts of a Neutral Nation exercising jurisdiction over captures brought *infra præsidia* of the Neutral Power, has been thought to

[35] The Invincible, 2 Gallison, p. 35.

[36] Letter of the Duke of Newcastle of 8 Feb. 1753, in answer to the Prussian Memorial. Collectanea Juridica, London 1791, pp. 135, 137.

derive some countenance from a decision of the Supreme Court of the United States in the year 1794, in the case of a Swedish vessel, the Betsey, laden with Swedish and American property, which had been captured by a French privateer, the Citizen Genet, on the High Seas, and sent into the port of Baltimore [37]. The Supreme Court overruled in this case the decrees of the District and Circuit Courts declining jurisdiction, and held that the Admiralty Courts of the United States were competent to enquire and decide whether restitution should be made to the claimants in whole or in part, (that is, whether such restitution can be made consistently with the Law of Nations and the Treaties and Laws of the United States.) But this judgment was very carefully reviewed by the Supreme Court of the United States in 1816, which held that the only question settled in the case of Glass *v.* the Betsey was, that the dispossession of the master and crew of any vessel on the High Seas was *primâ facie* a Maritime *tort*, of which every Admiralty Court might take cognisance according to the Law of Nations; and that the case was sent back by the Supreme Court with a view that the District Court should exercise jurisdiction, subject however to the Law of Nations on this subject as the rule to govern its decision. On this occasion, Mr. Justice Johnson [38], in delivering the judgment of the Supreme Court, observed, that "every violent dispossession of property on the ocean is *primâ facie* a maritime *tort;* as such, it belongs to the Admiralty jurisdiction. But sitting and judging as such Courts do by the Law of Nations, the moment that it is ascertained to be a seizure by a com-

[37] Glass *v.* the Sloop Betsey, 3 Dallas, p. 6.

[38] L'Invincible, 1 Wheaton, p. 258.

missioned cruiser, made in the legitimate exercise of the Rights of War, their progress is arrested; for this circumstance is in those Courts a sufficient evidence of Right. That the mere fact of seizure, as Prize, does not of itself oust the Neutral Admiralty Court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the Courts of a Neutral may interfere to divest possession; to wit, those in which her own Right to stand Neutral is invaded; and there is no case in which the Court of a Neutral may not claim the Right of determining whether the capturing vessel be in fact the commissioned cruiser of a Belligerent Power [39]. Without the exercise of jurisdiction thus far, in all cases, the power of the Admiralty would be inadequate to afford protection from piratical capture." But the Court of a Neutral Power will only so far enquire into the Commission of the capturing vessel as to ascertain its authenticity. The Commission of a Public Ship, duly authenticated by the signature of the proper authorities of the Nation to which she belongs, imports absolute verity [40], so far at least as Foreign Courts are concerned, and is complete proof of the title to exercise Belligerent Rights.

Neutral Courts do not entertain questions of Damages.

§ 235. The same considerations of Comity which are now held to preclude the Court of a Neutral Nation from sitting in judgment on the question of the validity of a capture made upon the High Seas, even if the captured property should be voluntarily brought by the captor within its jurisdiction, preclude it from entertaining the question of Damages, even when the seizure has been made within its Territory, and the Neutral Court has de-

[39] Life of Sir Leoline Jenkins, Vol. II. p. 727.

[40] The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 336.

creed that the vessel and her cargo shall be set free. If a Belligerent cruiser has attacked and seized an enemy vessel within Neutral Territory, no Right of the enemy vessel has been violated by such an attack and seizure; for no Rights exist between enemies, except what are termed Rights of War, and one of the Rights of War is to attack and destroy an enemy, wherever he may be found. "A capture made within Neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the Neutral Sovereign that its legal validity can be called in question; and as to him, and him only, is it to be considered void[41]." A Neutral Power may interpose at any time and forbid a Belligerent to exercise within its jurisdictional waters the Rights, which a state of War gives rise to as against his adversary: it may arrest, in virtue of its Sovereignty over the place, a combat between Belligerents *dum fervet opus;* or if the combat should have been brought to an end by the submission of one of the combatants, it may require the victor to set the vanquished party free; but when a Neutral Power so interposes between Belligerent parties, it does not profess to redress a wrong done by one Belligerent to another, but it refuses to allow a Right of War to be exercised by a Belligerent against his enemy, because the Territory of a Neutral State is by the Law of Nations not subject to the exercise of any Right of War against the will of the State. Accordingly, if a Belligerent vessel has attacked an enemy vessel within the jurisdiction of a Neutral Power, and has been worsted in the conflict, the Neutral Power may justly decline, if it sees fit, to interpose between the vanquished party and the operation of the *jus belli*, which it has been the first

[41] The Anne, 3 Wheaton, p. 447.

to invoke. "Whilst the ship was lying within Neutral waters, she was bound," says Mr. Justice Story[42], "to abstain from all hostilities except in self defence. The Privateer had an equal title with herself to the Neutral protection, and was in no fault in approaching the coast without showing its National character. It was a violation of that Neutrality, which the captured ship was bound to observe, to commence hostilities for any purpose in these waters, for no vessel coming here was bound to submit to search, or to account to her for her conduct or character. When therefore she commenced hostilities, she forfeited the Neutral protection, and the capture was no injury for which any redress would be rightfully sought from the Neutral Sovereign."

The Supreme Court of the United States has accordingly held that the jurisdiction of a Neutral Court of Admiralty over captures made in violation of Neutral Territory, is exercised only for the purpose of restoring the property which has been voluntarily brought *infra præsidia*[43] of the Neutral Power, and does not extend to the awarding of damages against the captors as in ordinary cases of maritime *torts*. A Spanish ship[44] was captured on the High Seas by a Venezuelan Privateer, La Guerriere, and subsequently brought into the port of New Orleans. It was established that the Privateer had augmented her crew in the United States during the cruise, and before the capture, in violation of the Neutrality of the United States; and one of the questions raised upon appeal before the Supreme Court was, whether

[42] The Anne, 3 Wheaton, p. 447.

[43] Præsidia vero non esse navim, ad quam deducta erant bona capta, certum est, quæ inter mobilia numeratur; præsidia autem stationes. Alberic. Gentilis, Hispan. Advocationes, L. I. c. 11.

[44] La Amistad de Rues, 5 Wheaton, p. 385.

the District Court of New Orleans had rightfully decreed damages against the captors. Mr. Justice Story, in delivering the judgment of the Supreme Court in reversal of the decree of the District Court as to damages, observed: "The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our Neutrality, if the Prize comes voluntarily within our jurisdiction, it shall be restored to its owners. This is done upon the footing of the General Law of Nations, and the doctrine is fully recognised by the Act of Congress of 1794. But this Court has never yet been understood to carry its jurisdiction in cases of violation of Neutrality beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceeding. We are now called upon to give general damages for plunderage; and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine *torts*. We entirely disclaim any right to inflict such damages; and consider it no part of the duty of a Neutral Nation to interpose, upon the mere footing of the Law of Nations, to settle all the rights and wrongs which may grow out of a capture between Belligerents. Strictly speaking, there can be no such thing as a marine *tort* between enemies. Each has an undoubted Right to exercise all the Rights of War against the other; and it cannot be made a matter of judicial complaint, that they are exercised with severity, even if the parties do transcend those rules which the Customary Laws of War justify. At least they have never been held within the cognisance of the Prize tribunals of Neutral Nations. The captors are amenable to their

own Government exclusively for any excess or irregularity in their proceedings; and a Neutral Nation ought not otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its Neutral jurisdiction. A Neutral Nation may indeed inflict pecuniary or other penalties on the parties for such violation, but then it does it professedly in vindication of its own Rights, not by way of compensation to the captured. When called upon by either of the Belligerents to act in such cases, all that justice seems to require is, that the Neutral Nation shall fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound therefore to restore the property, if found within its own ports; but beyond this it is not obliged to interpose between the Belligerents. If indeed it were otherwise, there would be no end of the difficulties and embarrassments of Neutral Prize tribunals. They would be compelled to decide in every variety of shape upon marine trespasses *in rem* and *in personam* between Belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of witnesses, and thus they would draw within their jurisdiction almost every incident of Prize. Such a course of things would necessarily create irritations and animosities, and very soon embark Neutral Nations in all the controversies and hostilities of the conflicting parties. Considerations of policy came therefore in aid of what we consider the Law of Nations on the subject."

A Neutral Power may claim a vessel captured in violation of its Territory, before

§ 236. The Court of a Neutral Power, in decreeing restitution of property which has been captured by a Belligerent in violation of its Territory, when such property has been brought by the Belligerent *infra prædia* of the Neutral Power, performs a duty in

which all Belligerents have an equal interest, and which the Court of the Captor is itself bound to discharge, if the property should be brought *infra præsidia* of the Belligerent Power, under whose Commission the capture has been effected. It is also the privilege of the Neutral Power, within whose Territory a vessel has been captured by a Belligerent cruiser, if the vessel should be carried into a port of the Captor's country, to pursue the vessel in the Courts of the Captor, and to demand its restitution, on the ground that its seizure was a trespass upon its Neutrality. It is not however competent for the owner of a vessel to raise in the Court of a Belligerent Captor the objection, that the capture of the vessel is invalid by reason of its having been effected in violation of the Territory of a Neutral Power. Further, if in the absence of any suggestion from the Government of the Neutral Nation, whose Territory may have been violated, a vessel shall have been condemned in a competent Court of Prize jurisdiction, as good Prize, and sold to a third party under a decree of the Court, the purchaser will have a good title everywhere to the vessel, and may successfully resist any subsequent claim of the former owner, if the vessel should be found within the jurisdiction of the Neutral Nation, whose Territory may have been violated by the act of capture. The case of the Fanny[45] does not conflict with this view of the law, for in that case the Supreme Court of the United States, sitting as a Neutral Admiralty Court and decreeing restitution of property captured in breach of the Neutrality of the United States, held that there had been no condemnation of the pro-

a Belligerent Prize Court.

[45] 9 Wheaton, p. 658.

perty as Prize by a Competent Court; and that even if there had been a *bonâ fide* purchase of the goods, a *tortious* possessor of the property, to which he had no title at all, could not transfer a title to his vendee. There may however be an exception to the rule, that the decree of a competent Court of Prize founds a valid title to a ship, which cannot be called in question in any other Court. If the owner of the Belligerent vessel, which has violated the Sovereign Rights of a Neutral Nation in effecting the capture of an enemy's vessel, should become the purchaser of such vessel under a decree of sale made at his own prayer before a Prize Tribunal of his own country, and should subsequently bring the vessel within the territorial jurisdiction of the Power whose Neutrality was violated by its capture, the Courts of that Power, finding the captured property in the hands of the offender, will disregard the circuit of changes through which it may have passed, and will not allow him to set up a right springing out of his own wrong. Such indeed is the purport of a judgment of the Supreme Court of the United States in the case of the Arrogante Barcelonas[46]. "In the hands of a third person," Mr. Justice Johnson observes, "a valid sentence of condemnation, properly authenticated, would present a very different view of the subject. The offender's touch here restores the taint, from which the condemnation may have purified the Prize. Although a purchaser without notice may in many cases hold his purchase free from an interest, with which it was chargeable in the hands of the vendor, yet it cannot return into the hands of the vendor without reviving the original lien. Nor will Courts of Justice

[46] The Arrogante Barcelonas, 7 Wheaton, p. 496. Kent's Commentaries on American Law, Tom. I. p. 121.

ever yield the *locus standi in judicio* to the suitor, who is compelled to trace his title through his own criminal acts."

Neutral Powers do not interpose their jurisdiction in cases of Rescue.

§ 237. A Neutral Court of Admiralty has no jurisdiction to decree restitution of a vessel which has been seized by prisoners on board, or has been rescued by its crew from its captors, and carried into a Neutral port, when there has been no breach of its Neutrality. A Neutral State is bound to regard all captures made by either Belligerent party as equally just, excepting in such cases where its own Rights of Sovereignty have been invaded. "The Right of *postliminium*," says Vattel[47], "does not take effect in Neutral countries, for when a Nation chooses to remain Neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects, and consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, or the right of *postliminium*, would be declaring in favour of the former, and departing from the line of Neutrality." Thus the British vessel Vere was taken possession of on the High Seas by a number of French prisoners, who had been put on board of her by the British Government for conveyance from Jamaica to England, and who rose upon the captain as soon as she parted from the Convoy. The vessel was subsequently carried by the French captors into the port of Georgetown, in South Carolina, where a libel was filed in the District Court, praying for restitution of the vessel under the Law of Nations. The Court held that the captors were entitled to the Right of Asylum,

[47] Vattel, L. III. c. 14. § 208.

and that their plea in bar to the jurisdiction of the Court ought to be sustained[48]. On the other hand, the United States' merchant-vessel, Lone, commanded by Captain Clarke, in the course of a voyage to New Orleans, as her port of final destination, entered the port of Matamoras, then under blockade by a French squadron. On her homeward voyage she was captured by a vessel belonging to the blockading squadron. Some days after the capture Captain Clarke rescued his vessel, and continuing his original voyage brought her safe into New Orleans, where it terminated. The Government of France applied to the Government of the United States for the vessel and cargo to be delivered up, on the ground of the original forfeiture of the vessel for breach of blockade, and the unlawful rescue of it. On this occasion the Attorney-General of the United States reported to the President of the United States, that there was "no instance known to him in which the United States Government had been called upon to interpose, and restore to the captors property, that was rescued from them by reason of failure on their own part to make the capture sure. By the well settled principles of International Law it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence, they fail to do so, the omission is at their peril. No instance is known in which it has been regarded as a ground for asking such interposition as is now sought[49]."

The same considerations of Law apply to Neutral vessels, which have been rescued by their crews from

[48] Reid *v.* Ship Vere. Bee's Reports, p. 66. (22 Jan. 1795.)

[49] Opinions of the Attorneys-General of the United States, Vol. III. p. 327. (11 Oct. 1838.)

a Belligerent captor, and have escaped into a port of their own country after capture. The Supreme Court of the United States, in discussing the point whether the Courts of a Neutral Power were competent to entertain the question of Prize or no Prize in regard to a vessel belonging to a Subject of the Neutral Power, which had been brought into its ports by the Belligerent captor, observed, that "the situation of the captured ship of a citizen is precisely the same as of any other captured Neutral, or rather the obligation to abstain from interference between the captor and the captured becomes greater, inasmuch as it is purchased by a concession from a Belligerent of no little importance to the peace of the world, and particularly of the Nation of the offending individual, namely, that the Neutral Nation shall not be implicated in his misconduct. The Belligerent contents himself with cutting up the unneutral commerce, and makes no complaint to the Neutral Power, not even where the individual rescues his vessel and escapes into his own port after capture[50]."

Conflict of jurisdiction between a Neutral Admiralty Court and a Belligerent Prize Court.

§ 238. A conflict of jurisdiction may arise between a Neutral Admiralty Court and a Belligerent Prize Court, under circumstances of this nature. Property has been sometimes condemned in the Prize Court of a Belligerent Power, notwithstanding that it has been lying in a Neutral port. In case, however, that such property should have been captured in violation of the Neutrality of the State, within whose territorial jurisdiction the captured property has been brought, it will be competent for the Admiralty Court of the Neutral State to decree restitution of such property to the owners, who have been dispossessed of it by the wrongful act of the captors. The captors, on the

[50] L'Invincible, 1 Wheaton, p. 256.

other hand, if they have proceeded *pari passu* in the Prize Court of their own country, may have obtained a decree of condemnation of the property as good Prize of war, in the absence of any suggestion from the Agent of the Neutral State that its Neutrality has been violated. The possible conflict between two such sentences was considered by the Supreme Court of the United States in the case of property, which had been captured by a Belligerent privateer, after it had augmented its crew in a port of the United States during its cruise. It was asserted before the Neutral Admiralty Court, that the Prize Court of the Belligerent Power had condemned the property in controversy pending the suit before the Neutral Court. "Assuming," says Mr. Justice Story, in delivering the opinion of the Supreme Court, "for the purpose of argument, that the condemnation was regularly made and is duly authenticated, we are of opinion that it cannot oust the jurisdiction of this Court, after it has once regularly attached itself to the cause. By the seizure and possession of the property under process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law. It has been since sold by consent of the parties, under an interlocutory decree of the Court, and the proceeds are deposited in the Registry to abide the final adjudication. Admitting then that property may be condemned whilst lying in a Neutral country, (a doctrine which has been affirmed by this Court,) still it can be so adjudicated only, while the possession of the captor remains; for if it be devested in fact or by operation of the law, that possession is gone, which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a Neutral tribunal, and the

title is in litigation there, no other foreign Court can by its adjudication rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a Sovereign authority over the Court having possession of the thing, and to take from the Nation the right of vindicating its own justice and Neutrality[51]." Lord Stowell, in administering the Prize Law of the English Admiralty Court in the case of a British vessel captured by a Dutch privateer, which had been sold under a sentence of condemnation passed in a Prize Court at the Hague, whilst the vessel itself was lying in a Norwegian port, was most reluctant to recognise the validity of such a sale, on the ground that "the *res ipsa*, the *corpus*, was not within the possession of the Dutch Court, and possession founds the jurisdiction[52]," but he deferred to the practice which had been not only admitted, but applied by British Prize Courts, and, in violation of what he believed to be the true principle, felt bound by precedent to recognise the title given by the decree of the Dutch Court. But his objection is well worthy of the consideration of Belligerent Powers, for the decree of condemnation of a Belligerent Court must of necessity remain a dead letter, if a Neutral Court should be in possession of the *res*, and should adjudge it to be restored to the owner on the ground of the capture involving a violation of its Neutrality.

Duties of a Neutral Power in cases of Civil War.

§ 239. If a state of War exists between a Government *de jure* and a Government *de facto* of any Country, foreign Powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both Belligerent parties the free exercise of those

[51] The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 385.

[52] The Henrick and Maria, 4 Ch. Rob. p. 56.

Rights, which War gives to Public Enemies against each other, such as the Right of Search, the Right of Blockade, the Right of capturing Contraband of War and Enemy's property laden in Neutral vessels[53]. A Government *de jure* may notify to foreign Powers that there is an Insurrection against it, whereby its Laws within its Territory are not executed, and that it has deemed it advisable to have recourse to measures of war against the Insurgents by setting on foot a blockade of the ports in their occupation, or otherwise, and by enforcing such blockade pursuant to the Law of Nations. Such a Notification imposes at once upon a foreign Nation the necessity of deciding upon one out of three alternative courses of action. It may assist the Government *de jure*, or it may assist the Insurgents, in either of which cases it becomes a party to the War; or it may remain impartial, still continuing to treat the Government *de jure* as an independent Power, whilst it treats the Insurgents as a Community entitled to the Rights of War against its adversary. It is obviously impossible for a neutral Power to recognise the character of one party as a Belligerent, without acknowledging the Belligerent character of its adversary. As long as an Insurrection against a Government *de jure* is confined within the limits of its Territory, foreign Nations are not concerned in it; but if the contending parties violently assail the lives, vessels, and property of one another on the High Seas, all Nations are necessarily concerned in their quarrel; for the peace of the High Seas is disturbed thereby, which peace can only be lawfully violated by parties, who are exercising Belligerent Rights. A violation of the peace of the High Seas is either an act of Piracy or an act of War, according

[53] Wheaton's Elements, Part I. c. II. § 7.

as such act is done with the design of robbery, or with the object of prosecuting a Right. Lord Stowell declined to treat a capture made on the High Seas by an Algerine Corsair as an act of Piracy, as it had been effected by a vessel belonging to the Dey of Algiers himself, and the Dey had intervened to guaranty the transfer of the captured ship to a Spanish purchaser. From these circumstances he held that the acts of capture and condemnation were not mere private acts of depredation, but must be presumed to have been conducted in accordance with what the Dey conceived to be a Right under the Mohammedan Law of Nations[54]. If the Government of a State has notified to foreign Powers that it has had recourse to force, which it intends to employ in pursuance of the Law of Nations, it is immaterial against what adversary such force is to be directed. Foreign Powers are bound to accept such Notification, as an announcement of a state of War between the Government of that State and its adversary; in other words, they are bound to measure the acts of violence committed on both sides, if they interfere with the peace of the High Seas, by the rules which govern the relations of Nations in time of War. The Government of a State may notify to foreign States that there is a state of Tumult amongst its Subjects, whereby it has become necessary for it in the exercise of its Rights of Sovereignty to interdict certain of its ports to foreign merchants, until the tumult is appeased; and that, if foreigners should enter the interdicted ports, they will be subject to certain penalties under its territorial Law. The Notification of such a fact gives to the Government of such a State no new Rights against foreign Nations; it is simply an announce-

[54] The Helena, 4 Ch. Rob. p. 7.

ment to them that it intends to exercise its Rights of Sovereignty within its own Territory in a certain manner, and they are bound to respect its territorial Independence. But a Notification to Foreign Powers on the part of the Government of a State that it has established a Blockade of certain ports in pursuance of the Law of Nations, and that, if any vessel should attempt to enter or leave any of the blockaded ports, it will be captured, and proceeded against as Prize of War, will warrant the notifying Power in exercising the Rights of a Belligerent with respect to all foreign vessels; and those Rights will not be confined to vessels which have entered its Territory, but may be exercised on the High Seas against vessels which are approaching its Territory. Under such circumstances a foreign Nation is not concerned with the justice or injustice of the War, and it is not for it, if it wishes to remain Neutral, to judge between the parties to the War, and to grant or refuse more or less to the one or the other, as it thinks its cause to be more or less just or unjust. A Nation therefore which wishes to be Neutral in such a War, must acquiesce in either party exercising the Rights of a Belligerent in regard to all foreign Nations; for it cannot concede the exercise of those Rights to one party, and refuse it to the other, without interfering in the War. Thus in the year 1835 the population of Texas rose in insurrection against the Government of Mexico, and a Civil War ensued. The Mexican President, General Santa Anna, thereupon invaded the Territory of Texas, in order to reduce the rebellious province to submission, and in the month of April 1836 fought the battle of San Jacinto, in which the army of the Government *de jure* was defeated, and the President Santa Anna taken prisoner. In the same month of April the American brig Pocket

sailed from New Orleans for the port of Brassos of St. Jago, within the limits of Texas; and when approaching her destination was captured by the armed schooner Invincible, sailing under the flag of the recently constituted Republic of Texas, on the alleged ground that she was carrying Contraband of War for the use of the Mexican army under the command of General Santa Anna. The officer in command of the United States' naval forces in the Gulf of Mexico, having heard of the capture of the brig, promptly despatched the United States' ship of war Warren to capture the Invincible, and to send her into New Orleans for adjudication as a Pirate. Pursuant to these orders the Invincible was captured on 29 April with the principal part of her crew, and the vessel and men were sent into New Orleans, and delivered up to the Civil authorities, to be proceeded against as Pirates. The United States Government had however recognised the existence of a Civil War between the people of Texas and the Government of Mexico in November 1835, and the President of the United States had given notice to the Mexican Government of his intention to maintain the Neutrality of the United States. Under these circumstances, the Attorney General of the United States reported to the President, that when "a Civil War breaks out in a foreign Nation, and part of such Nation erects a distinct and separate Government, and the United States, although they do not acknowledge the Independence of the new Government, do yet recognise the existence of a Civil War, our Courts have uniformly regarded each party as a Belligerent Nation in regard to acts done *jure belli*. Such may be unlawful, when measured by the Law of Nations, or by Treaty-Stipulations; the individuals concerned in them may be treated as trespassers, and the Nation

to which they belong may be held responsible to the United States, but the parties concerned are not treated as Pirates[55]." A similar view of the juridical incidents of a Civil War has been frequently expressed by the Supreme Court of the United States. Mr. Justice Story, in delivering the judgment of that Court in a case in which the Neutrality of the United States had been violated by a Public armed vessel belonging to the Government of the United Provinces of Rio de la Plata, observed, "There is another objection urged against the admission of this vessel to the privileges and immunities of a Public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not been acknowledged as a Sovereign Independent Government by the Executive or Legislature of the United States, and therefore is not entitled to have her ships of War recognised by our Courts as National ships. We have in former cases had to express our opinion on this point. The Government of the United States has recognised the existence of a Civil War between Spain and her Colonies, and has avowed her intention to remain Neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a Belligerent Nation, having, so far as concerns us, the Sovereign Rights of War, and entitled to be respected in the exercise of those Rights. We cannot interfere to the prejudice of either Belligerent without making ourselves a party to the contest, and departing from the posture of Neutrality. All captures made by each must be considered as having the same validity, and

[55] Opinions of the Attorneys General of the United States, Vol. II. p. 1065.

all the immunities, which may be claimed by Public ships in our ports under the Law of Nations, must be considered as equally the Right of each, and as such must be recognised by our Courts of Justice, until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this Court, and we see no reason to depart from it[56]."

Belligerent Right of Capture reconcilable with the Independence of Neutral Nations.

§ 240. A state of War does not give rise to any Rights on the part of Belligerent Nations in their relations with Neutral Nations, which derogate in any way from the Sovereignty of the latter. If a Belligerent cruiser captures a merchant vessel on the High Seas, it does not violate the Sovereignty of the Nation, to whose citizens the merchant vessel may belong as property. The Rights of Sovereignty of every Nation are restricted to the limits of its Territory; and if in certain matters it exercises any Right of Sovereignty beyond the limits of its Territory, it does so under the Comity of Nations. Accordingly, if an armed ship of one Nation captures on the High Seas a merchant vessel which belongs to the Subjects of another Nation, there is neither the exercise of any Right of Sovereignty, nor the violation of any Right of Sovereignty, on either side. If an armed ship is commissioned by a Nation to make War against another Nation, it is authorised by the Law of Nations to exercise all the Rights of War, in other words, the Rights of Natural Justice, applicable to the prosecution of the particular Right or the redress of the particular Wrong, which is the object of the War. Amongst the Rights of Natural Justice is the seizure of Enemy's property wherever it may be found, if it

[56] The Santissima Trinidad and the St. Ander, 7 Wheaton, p. 337. The Divina Pastora, 4 Wheaton, p. 52. The United States *v.* Palmer, 3 Wheaton, p. 610. The Estrella, 4 Wheaton, p. 302. The Neustra Senora de la Caridad, 4 Wheaton, p. 497.

is not under the protection of the Sovereignty of a Neutral Nation. But property ceases to be under the protection of the Sovereignty of a Neutral Nation, when it ceases to be within its Territory, and by parity of reason a Neutral Nation ceases to be responsible for the Neutrality of individuals, when they are beyond the limits of its Sovereignty. In the case where a Belligerent cruiser captures a merchant vessel, which is the property of the Subjects of a Neutral Power, for a breach of Neutrality, the capture is not made as of a vessel of a Neutral merchant, but as of one who, quitting his Neutrality, voluntarily arrays himself on the side of the Enemy. On this subject, to use the language of Mr. Justice Johnson, in delivering the judgment of the Supreme Court of the United States, "there appears to be a tacit Convention between the Neutral Power and the Belligerent Power, that, on the one hand, the Neutral State shall not be implicated in the misconduct of the individual; and, on the other, that the offender shall be subjected to the exercise of Belligerent Right." Accordingly, if a vessel, which is the property of a Subject of a Neutral Power, has been taken on the High Seas by a Belligerent cruiser in an act of unneutral trade, and should be brought by the captor within the jurisdiction of the Neutral Power, the situation of that ship towards the Neutral Power is precisely the same as that of any other captured Neutral, or rather the obligation of the Neutral Power to abstain from interference between the captor and the captured vessel becomes greater, inasmuch as it is purchased by a concession from the Belligerent of no slight importance to the peace of the world, and particularly of the Nation of the offending individual. On the other hand, the Belligerent Power contents itself with suppressing the

unneutral commerce, and makes no complaint to the Neutral Power, not even where a merchant vessel, which has been captured by a Belligerent cruiser, has been rescued by its crew on the High Seas, and has escaped in safety within the jurisdiction of the Neutral Power[57]."

[57] The Invincible, 1 Wheaton, p. 255.

END OF PART II.

APPENDIX.

APPENDIX.

CONGRESS OF PARIS, 1856.

RECORDING (1) the expression by the Plenipotentiaries of the wish of their respective Governments, that States, before appealing to arms, should have recourse, as far as circumstances may allow, to the good offices of a friendly Power; (2) a Declaration respecting Maritime Law; (3) an agreement that the Powers, which have signed the said Declaration, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not rest on the four principles, which are the object of the said Declaration.

Protocole No. 23.—*Séance du* 14 *Avril*, 1856.

PRÉSENTS:—Les Plénipotentiaires de l'Autriche: de la France: de la Grande Bretagne: de la Prusse: de la Russie: de la Sardaigne: de la Turquie.

Le Protocole de la séance précédente et son Annexe sont lus et approuvés.

M. le Comte Walewski rappelle qu'il reste au Congrès à se prononcer sur le projet de Déclaration dont il a indiqué les bases dans la dernière réunion, et demande aux Plénipotentiaires qui s'étaient réservé de prendre les ordres de leurs Cours respectives, à cet égard, s'ils sont autorisés à y donner leur assentiment.

M. le Comte de Buol déclare que l'Autriche se félicite de

pouvoir concourir à un Acte dont elle reconnaît la salutaire influence, et qu'il a été muni des pouvoirs nécessaires pour y adhérer.

M. le Comte Orloff s'exprime dans le même sens; il ajoute, toutefois, qu'en adoptant la proposition faite par M. le premier Plénipotentiaire de la France, sa Cour ne saurait s'engager à maintenir le principe de l'abolition de la course et à le défendre, contre des Puissances qui ne croiraient pas devoir y accéder.

MM. les Plénipotentiaires de la Prusse, de la Sardaigne, et de la Turquie, ayant également donné leur assentiment, le Congrès adopte le projet de rédaction annexé au présent Protocole, et en renvoie la signature à la prochaine réunion.

M. le Comte de Clarendon, ayant demandé la permission de présenter au Congrès une proposition qui lui semble devoir être favorablement accueillie, dit que les calamités de la guerre sont encore trop présentes à tous les esprits pour qu'il n'y ait pas lieu de rechercher tous les moyens qui seraient de nature à en prévenir le retour; qu'il a été inséré à l'Article VII du Traité de Paix une stipulation qui recommande de recourir à l'action médiatrice d'un Etat ami avant d'en appeler à la force, en cas de dissentiment entre la Porte et l'une ou plusieurs des autres Puissances signataires.

M. le premier Plénipotentiaire de la Grande Bretagne pense que cette heureuse innovation pourrait recevoir une application plus générale et devenir ainsi une barrière opposée à des conflits qui, souvent, n'éclatent que parcequ'il n'est pas toujours possible de s'expliquer et de s'entendre.

Il propose donc de se concerter sur une résolution propre à assurer, dans l'avenir, au maintien de la paix cette chance de durée, sans, toutefois, porter atteinte à l'indépendance des Gouvernements.

M. le Comte Walewski se déclare autorisé à appuyer l'idée émise par M. le premier Plénipotentiaire de la Grande Bretagne; il assure que les Plénipotentiaires de la France sont tout disposés à s'associer à l'insertion au Protocole d'un vœu qui, en répondant pleinement aux tendances de notre époque, n'entraverait, d'aucune façon, la liberté d'action des Gouvernements.

M. le Comte de Buol n'hésiterait pas à se joindre à l'avis

des Plénipotentiaires de la Grande Bretagne et de la France, si la résolution du Congrès doit avoir la forme indiquée par M. le Comte Walewski; mais il ne saurait prendre, au nom de sa Cour, un engagement absolu et de nature à limiter l'indépendance du Cabinet Autrichien.

M. le Comte de Clarendon répond que chaque Puissance est et sera seule juge des exigences de son honneur et de ses intérêts; qu'il n'entend nullement circonscrire l'autorité des Gouvernements, mais seulement leur fournir l'occasion de ne pas recourir aux armes, toutes les fois que les dissentiments pourront être aplanis par d'autres voies.

M. le Baron de Manteuffel assure que le Roi, son auguste Maître, partage complétement les idées exposées par M. le Comte de Clarendon; qu'il se croit donc autorisé à y adhérer et à leur donner tout le développement qu'elles comportent.

M. le Comte Orloff, tout en reconnaissant la sagesse de la proposition faite au Congrès, croit devoir en référer à sa Cour avant d'exprimer l'opinion des Plénipotentiaires de la Russie.

M. le Comte de Cavour désire savoir, avant de donner son opinion, si dans l'intention de l'auteur de la proposition, le vœu, qui serait exprimé par le Congrès, s'étendrait aux interventions militaires dirigées contre des Gouvernements de fait, et cite, comme exemple, l'intervention de l'Autriche dans le Royaume de Naples en 1821.

Lord Clarendon répond que le vœu du Congrès devrait admettre l'application la plus générale; il fait remarquer que, si les bons offices d'une autre Puissance avaient déterminé le Gouvernement Grec à respecter les lois de la neutralité, la France et l'Angleterre se seraient très probablement abstenues de faire occuper le Pirée par leurs troupes. Il rappelle les efforts faits par le Cabinet de la Grande Bretagne, en 1823, pour prévenir l'intervention armée qui eut lieu, à cette époque, en Espagne.

M. le Comte Walewski ajoute qu'il ne s'agit ni de stipuler un droit, ni de prendre un engagement; que le vœu exprimé par le Congrès ne saurait, en aucun cas, opposer des limites à la liberté d'appréciation, qu'aucune Puissance ne peut aliéner dans les questions qui touchent à sa dignité; qu'il n'y a donc aucun inconvénient à généraliser l'idée dont s'est inspiré

M. le Comte de Clarendon, et à lui donner la portée la plus étendue.

M. le Comte de Buol dit que M. le Comte de Cavour, en parlant, dans une autre séance, de l'occupation des Légations par des troupes Autrichiennes, a oublié que d'autres troupes étrangères ont été appelées sur le sol des Etats Romains. Aujourd'hui, en parlant de l'occupation par l'Autriche du Royaume de Naples en 1821, il oublie que cette occupation a été le résultat d'une entente entre les Cinq Grandes Puissances réunies au Congrès de Laybach. Dans les deux cas, il attribue à l'Autriche la mérite d'une initiative et d'une spontanéité que les Plénipotentiaires Autrichiens sont loin de revendiquer pour elle.

L'intervention, rappelée par le Plénipotentiaire de la Sardaigne, a eu lieu, ajoute-t-il, à la suite des pourparlers du Congrès de Laybach; elle rentre donc dans l'ordre d'idées énoncé par Lord Clarendon. Des cas semblables pourraient encore se reproduire, et M. le Comte de Buol n'admet pas qu'une intervention, effectuée par suite d'un accord établi entre les Cinq Grandes Puissances, puisse devenir l'objet des réclamations d'un Etat de second ordre.

M. le Comte de Buol applaudit à la proposition, telle que Lord Clarendon l'a présentée, dans un but d'humanité; mais il ne pourrait y adhérer, si on voulait lui donner une trop grande étendue, ou en déduire des conséquences favorables aux Gouvernements de fait, et à des doctrines qu'il ne saurait admettre.

Il désire, au reste, que le Congrès, au moment même de terminer ses travaux, ne se voie pas obligé de traiter des questions irritantes et de nature à troubler la parfaite harmonie, qui n'a cessé de régner parmi les Plénipotentiaires.

M. le Comte de Cavour déclare qu'il est pleinement satisfait des explications qu'il a provoquées, et qu'il donne son adhésion à la proposition soumise au Congrès.

Après quoi MM. les Plénipotentiaires n'hésitent pas à exprimer, au nom de leurs Gouvernements, le vœu que les Etats entre lesquels s'éleverait un dissentiment sérieux, avant d'en appeler aux armes, eussent recours, en tant que les circonstances l'admettraient, aux bons offices d'une Puissance amie.

MM. les Plénipotentiaires espèrent que les Gouvernements

non représentés au Congrès s'associeront à la pensée qui a inspiré le vœu consigné au présent Protocole.

(Suivent les signatures.)

(Translation.)

Protocol No. 23.—Meeting of April 14, 1856.

PRESENT:—The Plenipotentiaries of Austria; France; Great Britain; Prussia; Russia; Sardinia; Turkey.

The Protocol of the preceding sitting and its Annex are read and approved.

Count Walewski remarks that it remains for the Congress to decide upon the draft of Declaration, of which he indicated the bases in the last meeting, and he demands of the Plenipotentiaries who had reserved to themselves to take the orders of their respective Courts in regard to this matter, whether they are authorised to assent to it.

Count Buol declares that Austria is happy to concur in an Act of which she recognises the salutary influence, and that he has been furnished with necessary powers to adhere to it.

Count Orloff expresses himself in the same sense; he adds, however, that in adopting the proposition made by the first Plenipotentiary of France, his Court cannot bind itself to maintain the principle of the abolition of privateering, and to defend it against Powers who might not think proper to accede to it.

The Plenipotentiaries of Prussia, of Sardinia, and of Turkey, having equally given their assent, the Congress adopts the draft annexed to the present Protocol, and appoints the next meeting for the signature of it.

The Earl of Clarendon having demanded permission to lay before the Congress a proposition, which it appears to him ought to be favourably received, states that the calamities of war are still too present to every mind not to make it desirable to seek out every expedient calculated to prevent their return; that a stipulation had been inserted in Article VII of the Treaty of Peace, recommending that in case of

difference between the Porte and one or more of the other signing Powers, recourse should be had to the mediation of a friendly State before resorting to force.

The first Plenipotentiary of Great Britain conceives that this happy innovation might receive a more general application, and thus become a barrier against conflicts, which frequently only break forth, because it is not always possible to enter into explanation and to come to an understanding.

He proposes, therefore, to agree upon a resolution calculated to afford to the maintenance of peace that chance of duration hereafter, without prejudice, however, to the independence of Governments.

Count Walewski declares himself authorized to support the idea expressed by the first Plenipotentiary of Great Britain; he gives the assurance that the Plenipotentiaries of France are wholly disposed to concur in the insertion in the Protocol of a wish, which, being fully in accordance with the tendencies of our epoch, would not in any way fetter the free action of Governments.

Count Buol would not hesitate to concur in the opinion of the Plenipotentiaries of Great Britain and of France, if the resolution of the Congress is to have the form indicated by Count Walewski, but he could not take, in the name of his Court, an absolute engagement calculated to limit the independence of the Austrian Cabinet.

The Earl of Clarendon replies, that each Power is and will be the sole judge of the requirements of its honour and of its interests; that it is by no means his intention to restrict the authority of the Governments, but only to afford them the opportunity of not having recourse to arms, whenever differences may be adjusted by other means.

Baron Manteuffel gives the assurance that the King, his august Master, completely shares the ideas set forth by the Earl of Clarendon; that he therefore considers himself authorized to adhere to them, and to give them the utmost development which they admit of.

Count Orloff, while admitting the wisdom of the proposal made to the Congress, considers that he must refer to his Court respecting it, before he expresses the opinion of the Plenipotentiaries of Russia.

Count Cavour, before he gives his opinion, wishes to know

whether, in the intention of the author of the proposition, the wish to be expressed by the Congress would extend to military interventions directed against *de facto* Governments, and quotes, as an instance, the intervention of Austria in the Kingdom of Naples in 1821.

Lord Clarendon replies that the wish of the Congress should allow of the most general application; he observes that if the good offices of another Power had induced the Government of Greece to respect the laws of neutrality, France and England would very probably have abstained from occupying the Piræus with their troops. He refers to the efforts made by the Cabinet of Great Britain in 1823, in order to prevent the armed intervention, which took place at that time in Spain.

Count Walewski adds, that there is no question of stipulating for a right or of taking an engagement; that the wish expressed by the Congress cannot in any case oppose limits to the liberty of judgment, of which no Power can divest itself in questions affecting its dignity; that there is therefore no inconvenience in attaching a general character to the idea entertained by the Earl of Clarendon, and in giving to it the most extended application.

Count Buol says that Count Cavour, in speaking in another sitting of the occupation of the Legations by Austrian troops, forgot that other foreign troops have been invited into the Roman States. To-day, while speaking of the occupation by Austria of the Kingdom of Naples in 1821, he forgets that that occupation was the result of an understanding between the Five Great Powers assembled at the Congress of Laybach. In both cases, he attributes to Austria the merit of an initiative and of a spontaneous action, which the Austrian Plenipotentiaries are far from claiming for her.

The intervention, adverted to by the Plenipotentiary of Sardinia, took place, he adds, in consequence of the discussions of the Congress of Laybach; it therefore comes within the scope of the ideas expressed by Lord Clarendon. Similar cases might perhaps recur, and Count Buol does not allow that an intervention, carried into effect in consequence of an agreement come to between the Five Great Powers, can become the object of the remonstrances of a State of the second order.

Count Buol approves the proposition in the shape that Lord Clarendon has presented it, as having a humane object; but he could not assent to it, if it were wished to give to it too great an extension, or to deduce from it consequences favourable to *de facto* Governments, and to doctrines which he cannot admit.

He desires besides that the Conference, at the moment of terminating its labours, should not find itself compelled to discuss irritating questions, calculated to disturb the perfect harmony, which has not ceased to prevail among the Plenipotentiaries.

Count Cavour declares that he is fully satisfied with the explanations which he has elicited, and he accedes to the proposition submitted to the Congress.

Whereupon, the Plenipotentiaries do not hesitate to express, in the name of their Governments, the wish that States, between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power.

The Plenipotentiaries hope that the Governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present Protocol.

(The signatures follow.)

Annexe au Protocole No. 23.

Declaration.

Les Plénipotentiaires qui ont signé le Traité de Paris du trente Mars, mil huit cent cinquante-six, réunis en Conférence,—

Considérant :

Que le droit maritime, en temps de guerre, a été pendant longtemps l'objet de contestations regrettables ;

Que l'incertitude du droit et des devoirs en pareille matière, donne lieu, entre les neutres et les belligérants, à des divergences d'opinion qui peuvent faire naître des difficultés sérieuses et même des conflits ;

Qu'il y a avantage, par conséquent, à établir une doctrine uniforme sur un point aussi important;

Que les Plénipotentiaires assemblés au Congrès de Paris ne sauraient mieux répondre aux intentions, dont leurs Gouvernements sont animés, qu'en cherchant à introduire dans les rapports internationaux des principes fixes à cet égard;

Dûment autorisés, les susdits Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but; et étant tombés d'accord ont arrêté la Déclaration solennelle ci-après:—

1. La course est et demeure abolie;

2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre;

3. La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi;

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements des Plénipotentiaires soussignés s'engagent à porter cette Déclaration à la connaissance des Etats, qui n'ont pas été appelés à participer au Congrès de Paris, et à les inviter à y accéder.

Convaincus que les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par le monde entier, les Plénipotentiaires soussignés ne doutent pas, que les efforts de leurs Gouvernements pour en généraliser l'adoption ne soient couronnés d'un plein succès.

La présente Déclaration n'est et ne sera obligatoire qu'entre les Puissances, qui y ont, ou qui y auront accédé.

Fait à Paris, le seize Avril, mil huit cent cinquante-six.

(Signé)

Buol-Schauenstein.	Hatzfeldt.
Hubner.	Orloff.
Walewski.	Brunnow.
Bourqueney.	Cavour.
Clarendon.	De Villamarina.
Cowley.	Aali.
Manteuffel.	Mehemmed Djemil.

(Translation.)

The Plenipotentiaries who signed the Treaty of Paris of the thirtieth of March, one thousand eight hundred and fifty six, assembled in Conference,—

Considering:

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn Declaration:—

1. Privateering is, and remains, abolished;

2. The neutral flag covers enemy's goods, with the exception of contraband of war;

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the States, which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not, that the efforts of their Governments to obtain the general adoption thereof will be crowned with full success.

The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

Done at Paris, the sixteenth of April, one thousand eight hundred and fifty-six.

(Signed)

BUOL-SCHAUENSTEIN.	HATZFELDT.
HUBNER.	ORLOFF.
WALEWSKI.	BRUNNOW.
BOURQUENEY.	CAVOUR.
CLARENDON.	DE VILLAMARINA.
COWLEY.	AALI.
MANTEUFFEL.	MEHEMMED DJEMIL.

Protocole No. 24.—Séance du 16 Avril, 1856.

PRÉSENTS:—Les Plénipotentiaires de l'Autriche; de la France; de la Grande Bretagne; de la Prusse; de la Russie; de la Sardaigne; de la Turquie.

Le Protocole de la précédente séance est lu et approuvé.

M. le Comte Orloff annonce qu'il est en mesure, en vertu des instructions de sa Cour, d'adhérer définitivement au vœu consigné à l'avant dernier paragraphe du Protocole No. 23.

Il est donné lecture du projet de Déclaration annexé au Protocole de la dernière réunion, après quoi, et ainsi qu'ils l'avaient décidé, MM. les Plénipotentiaires procèdent à la signature de cet Acte.

Sur la proposition de M. le Comte Walewski, et reconnaissant qu'il est de l'intérêt commun de maintenir l'indivisibilité des quatre principes mentionnés à la Déclaration signée en ce jour, MM. les Plénipotentiaires conviennent que les Puissances, qui l'auront signée, ou qui y auront accédé, ne pourront entrer à l'avenir, sur l'application du droit des neutres en temps de guerre, en aucun arrangement, qui ne repose à la fois sur les quatre principes objet de la dite Déclaration.

Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnaît que la présente résolution, ne pouvant avoir d'effet retroactif, ne saurait invalider les Conventions antérieures.

M. le Comte Orloff propose à MM. les Plénipotentiaires d'offrir, avant de se séparer, à M. le Comte Walewski tous les remerciements du Congrès pour la manière dont il a conduit

ses travaux: "M. le Comte Walewski formait," dit-il, "à l'ouverture de notre première réunion, le vœu de voir nos délibérations aboutir à une heureuse issue; ce vœu se trouve réalisé, et assurément l'esprit de conciliation avec lequel notre Président a dirigé nos discussions, a exercé une influence que nous ne saurions trop reconnaître, et je suis convaincu de répondre aux sentiments de tous les Plénipotentiaires en priant M. le Comte Walewski d'agréer l'expression de la gratitude du Congrès."

M. le Comte de Clarendon appuie cette proposition, qui est accueillie avec un empressement unanime par tous les Plénipotentiaires, lesquels décident d'en faire une mention spéciale au Protocole.

M. le Comte Walewski répond qu'il est extrêmement sensible au témoignage bienveillant dont il vient d'être l'objet; et de son côté, il s'empresse d'exprimer à MM. les Plénipotentiaires sa reconnaissance pour l'indulgence dont il n'a cessé de recueillir les preuves pendant la durée des Conférences. Il se félicite avec eux d'avoir si heureusement et si complétement atteint le but proposé à leurs efforts.

Le présent Protocole est lu et approuvé.

(Suivent les signatures.)

(Translation.)

Protocol No. 24.—Sitting of April 16, 1856.

PRESENT:—The Plenipotentiaries of Austria; France; Great Britain; Prussia; Russia; Sardinia; Turkey.

The Protocol of the preceding sitting is read and approved.

Count Orloff announces that he is prepared, in virtue of instructions from his Court, to adhere definitively to the wish recorded in the last paragraph but one of the Protocol No. 23.

The draft of Declaration annexed to the Protocol of the last meeting is read; whereupon, and as they had determined, the Plenipotentiaries proceed to the signature of that Act.

On the proposition of Count Walewski, and recognising

that it is for the general interest to maintain the indivisibility of the four principles mentioned in the Declaration signed this day, the Plenipotentiaries agree that the Powers which shall have signed it, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not at the same time rest on the four principles which are the object of the said Declaration.

Upon an observation made by the Plenipotentiaries of Russia, the Congress admits that as the present resolution cannot have any retroactive effect, it cannot invalidate antecedent Conventions.

Count Orloff proposes to the Plenipotentiaries to offer to Count Walewski, before they separate, the thanks of the Congress for the manner in which he has guided its labours. "Count Walewski," he says, "at the opening of our first meeting expressed the wish to see our deliberations result in a happy issue; this wish is realized, and assuredly the spirit of conciliation, with which our President has directed our discussions, has exercised an influence for which we cannot be too grateful; and I am convinced that I act in accordance with the sentiments of all the Plenipotentiaries in requesting Count Walewski to accept the expression of the gratitude of the Congress."

The Earl of Clarendon supports this proposition, which is accepted with prompt unanimity by all the Plenipotentiaries, who determine to make a special mention of it in the Protocol.

Count Walewski replies that he is extremely sensible of the kind manifestation of which he is now the object, and on his part eagerly expresses to the Plenipotentiaries his gratitude for the indulgence, of which he has not ceased to receive the proofs during the Conferences. He congratulates himself with them on having so happily and so completely attained the object proposed for their exertions.

The present Protocol is read and approved.

(The signatures follow.)

NOTE.—All the proceedings of the Congress of Paris and the treaties consequent thereon are printed in Martens, Nouveau Recueil Général des Traités. Tom. XV. p. 700–794.

CONVENTION OF GENEVA, 1864.

ACCESSION of the British Government to the Convention signed at Geneva, August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field.

Signed at London, February 18, 1865.

And Acceptance thereof by the Swiss Confederation in the name of all the Contracting Parties.

Signed at Berne, March 3, 1865.

The President and Federal Council of the Swiss Confederation having communicated to the Government of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, a Convention signed at Geneva on the 22nd of August, 1864, between the Swiss Confederation, His Royal Highness the Grand Duke of Baden, His Majesty the King of the Belgians, His Majesty the King of Denmark, Her Majesty the Queen of Spain, His Majesty the Emperor of the French, His Royal Highness the Grand Duke of Hesse, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, His Majesty the King of Prussia, and His Majesty the King of Wurtemberg, for the amelioration of the condition of the wounded in armies in the field, which Convention is word for word as follows:—

Convention pour l'Amélioration du Sort des Militaires blessés dans les Armées en Campagne.

La Confédération Suisse; Son Altesse Royale le Grand-Duc de Bade; Sa Majesté le Roi des Belges; Sa Majesté le Roi de Danemark; Sa Majesté la Reine d'Espagne; Sa Majesté l'Empereur des Français; Son Altesse Royale le Grand-Duc de Hesse; Sa Majesté le Roi d'Italie; Sa Majesté le Roi des Pays-Bas; Sa Majesté le Roi de Portugal et des

Algarves; Sa Majesté le Roi de Prusse; Sa Majesté le Roi de Wurtemberg,—également animés du désir d'adoucir, autant qu'il dépend d'eux, les maux inséparables de la guerre, de supprimer les rigueurs inutiles, et d'améliorer le sort des militaires blessés sur les champs de bataille, ont résolu de conclure une Convention à cet effet, et ont nommé pour leurs Plénipotentiaires, savoir.;—

La Confédération Suisse, le Sieur Guillaume-Henri Dufour, Grand Officier de l'Ordre Impérial de la Légion d'Honneur, Général-en-chef de l'Armée Fédérale, Membre du Conseil des Etats; le Sieur Gustave Moynier, Président du Comité International de Secours pour les Militaires blessés et de la Société Genevoise d'utilité publique; et le Sieur Samuel Lehmann, Colonel Fédéral, Médecin-en-chef de l'Armée Fédérale, Membre du Conseil National;

Son Altesse Royale le Grand-Duc de Bade, le Sieur Robert Volz, Chevalier de l'Ordre du Lion de Zæhringen, Docteur en Médecine, Conseiller Médical à la Direction des Affaires Médicales; et le Sieur Adolphe Steiner, Chevalier de l'Ordre du Lion de Zæhringen, Médecin-Major;

Sa Majesté le Roi des Belges, le Sieur Auguste Visschers, Officier de l'Ordre de Léopold, Conseiller au Conseil des Mines;

Sa Majesté le Roi de Danemark, le Sieur Charles-Emile Fenger, Commandeur de l'Ordre de Danebrog, décoré de la Croix d'Argent du même Ordre, Grand-Croix de l'Ordre de Léopold de Belgique, &c., &c., Son Conseiller d'Etat;

Sa Majesté la Reine d'Espagne, le Sieur Don José Heriberto Garcia de Quevedo, Gentilhomme de Sa Chambre avec exercice, Chevalier Grand-Croix d'Isabelle la Catholique, Commandeur numéraire de l'Ordre de Charles III, Chevalier de première classe de l'Ordre Royal et Militaire de St. Ferdinand, Officier de la Légion d'Honneur de France, Son Ministre Résident auprès de la Confédération Suisse;

Sa Majesté l'Empereur des Français, le Sieur Georges-Charles Jagerschmidt, Officier de l'Ordre Impérial de la Légion d'Honneur, Officier de l'Ordre de Léopold de Belgique, Chevalier de l'Ordre de l'Aigle Rouge de Prusse de troisième classe, &c., &c., Sous-Directeur au Ministère des Affaires Etrangères; le Sieur Henri-Eugéne-Séguineau de Préval, Chevalier de l'Ordre Impérial de la Légion d'Hon-

neur, décoré de l'Ordre Impérial du Medjidié de quatrième classe, Chevalier de l'Ordre des Saints Maurice et Lazare d'Italie, &c., &c., Sous-intendant militaire de première classe; et le Sieur Martin-François Boudier, Officier de l'Ordre Impérial de la Légion d'Honneur, décoré de l'Ordre Impérial du Medjidié de quatrième classe, décoré de la médaille de la valeur militaire d'Italie, &c., &c., Médecin principal de deuxième classe;

Son Altesse Royale le Grand-Duc de Hesse, le Sieur Charles-Auguste Brodruck, Chevalier de l'Ordre de Philippe le Magnanime, de l'Ordre de St. Michel de Bavière, Officier de l'Ordre Royal du St. Sauveur, &c., &c., Chef de bataillon d'Etat-Major;

Sa Majesté le Roi d'Italie, le Sieur Jean Capello, Chevalier de l'Ordre des Saints Maurice et Lazare, Son Consul-Général en Suisse; et le Sieur Félix Baroffio, Chevalier de l'Ordre des Saints Maurice et Lazare, Médecin de Division;

Sa Majesté le Roi des Pays-Bas, le Sieur Bernard-Ortuinus-Théodore-Henri Westenberg, Officier de Son Ordre de la Couronne de Chêne, Chevalier des Ordres de Charles III d' Espagne, de la Couronne de Prusse, d'Adolphe de Nassau, Docteur en Droit, Son Secrétaire de Légation à Francfort;

Sa Majesté le Roi de Portugal et des Algarves, le Sieur José-Antonio Marques, Chevalier de l'Ordre du Christ, de Notre Dame de la Conception de Villa-Viçosa, de Saint Benoit d'Aviz, de Léopold de Belgique, &c., Docteur en Médecine et Chirurgie, Chirurgien de Brigade, Sous-Chef du Département de Santé au Ministère de la Guerre;

Sa Majesté le Roi de Prusse, le Sieur Charles-Albert de Kamptz, Chevalier de l'Ordre de l'Aigle Rouge de seconde classe, &c., &e., &c., Son Envoyé Extraordinaire et Ministre Plénipotentiaire près la Confédération Suisse, Conseiller intime de Légation; le Sieur Godefroi-Frédéric-François Lœffler, Chevalier de l'Ordre de l'Aigle Rouge de troisième classe, &c., &c., Docteur en Médecine, Médecin-Général du Quatrième Corps d'Armée; et le Sieur Georges-Hermann-Jules Ritter, Chevalier de l'Ordre de la Couronne de troisième classe, &c., &c., Conseiller intime au Ministère de la Guerre;

Sa Majesté le Roi de Wurtemberg, le Sieur Christophe-Ulric Hahn, Chevalier de l'Ordre des Saints Maurice et Lazare, &c., Docteur in Philosophie et Théologie, Membre de

la Direction Centrale et Royale pour les Etablissements de Bienfaisance ;

Lesquels, après avoir échangé leurs pouvoirs, trouvés en bonne et du forme, sont convenus des Articles suivants :—

ARTICLE I.

Les ambulances et les hôpitaux militaires seront reconnus neutres, et, comme tels, protégés et respectés par les belligérants aussi longtemps, qu'il s'y trouvera des malades ou des blessés.

La neutralité cesserait, si ces ambulances ou ces hôpitaux étaient gardés par une force militaire.

ARTICLE II.

Le personnel des hôpitaux et des ambulances, comprenant l'intendance, les services de santé, d'administration, de transport des blessés, ainsi que les aumôniers, participera au bénéfice de la neutralité lorsqu'il fonctionnera, et tant qu'il restera des blessés à relever ou à secourir.

ARTICLE III.

Les personnes désignées dans l'Article précédent pourront, même après l'occupation par l'ennemi, continuer à remplir leurs fonctions dans l'hôpital ou l'ambulance qu'elles desservent, ou se retirer pour rejoindre le corps auquel elles appartiennent.

Dans ces circonstances, lorsque ces personnes cesseront leurs fonctions, elles seront remises aux avant-postes ennemis, par les soins de l'armée occupante.

ARTICLE IV.

Le matériel des hôpitaux militaires demeurant soumis aux lois de la guerre, les personnes attachées à ces hôpitaux ne pourront, en se retirant, emporter que les objets, qui sont leur propriété particulière.

Dans les mêmes circonstances, au contraire, l'ambulance conservera son matériel.

ARTICLE V.

Les habitants du pays qui porteront secours aux blessés seront respectés, et demeureront libres. Les Généraux des Puissances belligérantes auront pour mission de prévenir les habitants de l'appel fait à leur humanité, et de la neutralité qui en sera la conséquence.

Tout blessé recueilli et soigné dans une maison y servira de sauvegarde. L'habitant qui aura recueilli chez lui des blessés sera dispensé du logement des troupes, ainsi que d'une partie des contributions de guerre qui seraient imposées.

ARTICLE VI.

Les militaires blessés ou malades seront recueillis et soignés, à quelque nation qu'ils appartiendront.

Les Commandants en chef auront la faculté de remettre immédiatement aux avantpostes ennemis, les militaires blessés pendant le combat, lorsque les circonstances le permettront, et du consentement des deux partis.

Seront renvoyés dans leurs pays ceux qui, après guérison, seront reconnus incapables de servir.

Les autres pourront être également renvoyés, à la condition de ne pas reprendre les armes pendant la durée de la guerre.

Les évacuations, avec le personnel qui les dirige, seront couvertes par une neutralité absolue.

ARTICLE VII.

Un drapeau distinctif et uniforme sera adopté pour les hôpitaux, les ambulances, et les évacuations. Il devra être, en toute circonstance, accompagné du drapeau national.

Un brassard sera également admis pour le personnel neutralisé, mais la délivrance en sera laissée à l'autorité militaire.

Le drapeau et le brassard porteront croix rouge sur fond blanc.

ARTICLE VIII.

Les détails d'exécution de la présente Convention seront réglés par les Commandants-en-chef des armées belligérantes, d'après les instructions de leurs Gouvernements respectifs, et conformément aux principes généraux énoncés dans cette Convention.

ARTICLE IX.

Les Hautes Puissances Contractantes sont convenues de communiquer la présente Convention aux Gouvernements, qui n'ont pu envoyer des Plénipotentiaires à la Conférence internationale de Genève, en les invitant à y accéder; le Protocole est à cet effet laissé ouvert.

ARTICLE X.

La présente Convention sera ratifiée, et les ratifications en

seront échangées à Berne, dans l'espace de quatre mois, ou plus tôt si faire se peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signée, et y ont apposé le cachet de leurs armes.

Fait à Genève, le vingt-deuxième jour du mois d'Août, de l'an mil huit cent soixante-quatre.

(Signé)

(L.S.) Général G. H. Dufour.
(L.S.) G. Moynier.
(L.S.) Dr. Lehmann.
(L.S.) Dr. Robert Volz.
(L.S.) Steiner.
(L.S.) Visschers.
(L.S.) Fenger.
(L.S.) J. Heriberto Garcia de Quevedo.
(L.S.) Ch. Jagerschmidt.
(L.S.) S. De Preval.
(L.S.) Boudier.
(L.S.) Brodruck.
(L.S.) Capello.
(L.S.) F. Baroffio.
(L.S.) Westenberg.
(L.S.) Jose Antonio Marques.
(L.S.) De Kamptz.
(L.S.) Lœffler.
(L.S.) Ritter.
(L.S.) Dr. Hahn.

(Translation.)

Convention for the Amelioration of the Condition of Soldiers wounded in Armies in the Field.

The Swiss Confederation, His Royal Highness the Grand Duke of Baden, His Majesty the King of the Belgians, His Majesty the King of Denmark, Her Majesty the Queen of Spain, His Majesty the Emperor of the French, His Royal Highness the Grand Duke of Hesse, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, His Majesty the King of Prussia, His Majesty the King of Wurtemberg, being equally animated by the desire to mitigate, as far as depends upon them, the evils inseparable from war, to suppress useless severities, and to ameliorate the condition of soldiers wounded on the field of battle, have resolved to conclude a Convention for that purpose, and have named as their Plenipotentiaries, that is to say :—

The Swiss Confederation, the Sieur William Henry Dufour, Grand Officer of the Imperial Order of the Legion of Honour,

General-in-chief of the Federal Army, member of the Council of the States; the Sieur Gustavus Moynier, President of the International Committee of Assistance for wounded Soldiers, and of the Genevese Society of Public Utility; and the Sieur Samuel Lehmann, a Federal Colonel, Physician-in-chief of the Federal Army, a member of the National Council;

His Royal Highness the Grand Duke of Baden, the Sieur Robert Volz, Knight of the Order of the Lion of Zæhringen, Doctor of Medicine, Medical Councillor in the Direction of Medical Affairs; and the Sieur Adolphus Steiner, Knight of the Order of the Lion of Zæhringen, Physician Major;

His Majesty the King of the Belgians, the Sieur Augustus Visschers, Officer of the Order of Leopold, a member of the Council of Mines;

His Majesty the King of Denmark, the Sieur Charles Emilius Fenger, Commander of the Order of Danebrog, decorated with the Silver Cross of the same Order, Grand Cross of the Order of Leopold of Belgium, &c., &c., his Councillor of State;

Her Majesty the Queen of Spain, the Sieur Don José Heriberto Garcia de Quevedo, Actual Gentleman of her Chamber, Knight Grand Cross of Isabella the Catholic, Commander of the fixed number of the Order of Charles III, Knight of the first class of the Royal and Military Order of St. Ferdinand, Officer of the Legion of Honour of France, her Minister Resident to the Swiss Confederation;

His Majesty the Emperor of the French, the Sieur George Charles Jagerschmidt, Officer of the Imperial Order of the Legion of Honour, Officer of the Order of Leopold of Belgium, Knight of the Order of the Red Eagle of Prussia of the third class, &c., &c., Sub-Director in the Department for Foreign Affairs; the Sieur Henry Eugène Seguineau de Préval, Knight of the Imperial Order of the Legion of Honour, decorated with the Imperial Order of the Medjidie of the fourth class, Knight of the Order of St. Maurice and St. Lazarus of Italy, &c., Military Sub-Intendant of the first class; and the Sieur Martin Francis Boudier, Officer of the Imperial Order of the Legion of Honour, decorated with the Imperial Order of the Medjidie of the fourth class, decorated with the medal for military valour of Italy, &c., &c., Principal Physician of the second class;

His Royal Highness the Grand Duke of Hesse, the Sieur

Charles Augustus Brodruck, Knight of the Order of Philip the Magnanimous, of the Order of St. Michael of Bavaria, Officer of the Royal Order of the Holy Redeemer, &c., &c., Commandant of a battalion of the Staff;

His Majesty the King of Italy, the Sieur John Capello, Knight of the Order of St. Maurice and St. Lazarus, His Consul-General in Switzerland; and the Sieur Felix Baroffio, Knight of the Order of St. Maurice and St. Lazarus, Physician of Division;

His Majesty the King of the Netherlands, the Sieur Bernard Ortuinus Theodore Henry Westenberg, Officer of His Order of the Oaken Crown, Knight of the Orders of Charles III of Spain, of the Crown of Prussia, of Adolphus of Nassau, Doctor of Laws, His Secretary of Legation at Frankfort;

His Majesty the King of Portugal and the Algarves, the Sieur José Antonio Marques, Knight of the Order of Christ, of Our Lady of the Conception of Villa-Viçosa, of St. Benedict of Aviz, of Leopold of Belgium, &c. Doctor of Medicine and Surgery, Surgeon of Brigade, Sub-Chief of the Department of Health in the Ministry of War;

His Majesty the King of Prussia, the Sieur Charles Albert de Kamptz, Knight of the Order of the Red Eagle of the second class, &c., &c., &c., His Envoy Extraordinary and Minister Plenipotentiary to the Swiss Confederation, Privy Councillor of Legation; the Sieur Godfrey Frederick Francis Lœffler, Knight of the Order of the Red Eagle of the third class, &c., &c., Doctor of Medicine, Physician-General of the fourth Corps d'Armée; and the Sieur George Hermann Julius Ritter, Knight of the Order of the Crown of the third class, &c., &c., Privy Councillor in the Ministry of War;

His Majesty the King of Wurtemberg, the Sieur Christopher Ulric Hahn, Knight of the Order of St. Maurice and St. Lazarus, &c., Doctor of Philosophy and Theology, Member of the Central and Royal Direction for Establishments of Beneficence;

Who, after having exchanged their powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I.

Ambulances and military hospitals shall be acknowledged

to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein.

Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

ARTICLE II.

Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality whilst so employed, and so long as there remain any wounded to bring in or to succour.

ARTICLE III.

The persons designated in the preceding Article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when those persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

ARTICLE IV.

As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ARTICLE V.

Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The Generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ARTICLE VI.

Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognised, after their wounds are healed, as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

ARTICLE VII.

A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge *(brassard)* shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and the arm-badge shall bear a red cross on a white ground.

ARTICLE VIII.

The details of execution of the present Convention shall be regulated by the Commanders-in-chief of belligerent armies, according to the instructions of their respective Governments, and in conformity with the general principles laid down in this Convention.

ARTICLE IX.

The High Contracting Powers have agreed to communicate the present Convention to those Governments which have not found it convenient to send Plenipotentiaries to the International Conference at Geneva, with an invitation to accede thereto; the Protocol is for that purpose left open.

ARTICLE X.

The present Convention shall be ratified, and the ratifications shall be exchanged at Berne in four months, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at Geneva, the twenty-second day of August, one thousand eight hundred and sixty-four.

(Signed)

(L.S.) General G. H. Dufour.
(L.S.) G. Moynier.
(L.S.) Dr. Lehmann.
(L.S.) Dr. Robert Volz.
(L.S.) Steiner.
(L.S.) Visschers.
(L.S.) Fenger.
(L.S.) J. Heriberto Garcia de Quevedo.
(L.S.) Ch. Jagerschmidt.
(L.S.) S. De Preval.
(L.S.) Boudier.
(L.S.) Brodruck.
(L.S.) Capello.
(L.S.) F. Baroffio.
(L.S.) Westenberg.
(L.S.) Jose Antonio Marques.
(L.S.) De Kamptz.
(L.S.) Lœffler.
(L.S.) Ritter.
(L.S.) Dr. Hahn.

And the Swiss Confederation having, in virtue of Article IX of the said Convention, invited the Government of Her Britannic Majesty to accede thereto;

The Undersigned, Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, duly authorized for that purpose, hereby declares that the Government of Her Britannic Majesty fully accedes to the Convention aforesaid.

In witness whereof he has signed the present Act of Accession, and has affixed thereto the seal of his arms.

Done at London, the eighteenth day of February, in the year of Our Lord one thousand eight hundred and sixty-five.

(L.S.) RUSSELL.

ACT OF ACCEPTANCE.

Le Conseil Fédéral de la Confédération Suisse:

Vu l'Acte signé à Londres le 18 Février, 1865, par lequel son Excellence le Ministre des Affaires Etrangères de Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, faisant usage de la faculté réservée à l'Article IX de la Convention Internationale conclu à Genève le 22 Août,

1864, pour l'amélioration du sort des militaires blessés dans les armées en campagne, déclare que le Gouvernement de Sa Majesté Britannique adhère entièrement à cette Convention; acte d'adhésion dont la teneur suit:—

(Here follows the Act of Accession.)

Déclare par les présentes:

En vertu de la disposition finale du procès-verbal d'échange des ratifications de la dite Convention, signé à Berne le vingt-deux Décembre, mil huit cent soixante-quatre, accepter cette adhésion tant au nom de la Confédération Suisse qu'en celui des autres hauts Etats Contractants, auxquels en est donné acte par la présente Déclaration.

En foi de quoi les présentes ont été signées par le Président et le Chancelier de la Confédération, et munis du sceau du Conseil Fédéral, à Berne, le 3 Mars, 1865.

Au nom du Conseil Fédéral Suisse,

Le Président de la Confédération,

(L.S.) SCHENK.

Le Chancelier de la Confédération,

SCHIESS.

(Translation.)

The Federal Council of the Swiss Confederation:

Having seen the Act signed at London on the 18th of February, 1865, whereby his Excellency the Minister for Foreign Affairs of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, in exercise of the power reserved by Article IX of the international Convention concluded at Geneva on the 22nd of August, 1864, for the amelioration of the condition of soldiers wounded in armies in the field, declares that the Government of Her Britannic Majesty fully accedes to that Convention; which Act of Accession is as follows:—

(Here follows the Act of Accession.)

Declares by these presents:—

In virtue of the final stipulation of the procès-verbal of the

exchange of the ratifications of the said Convention, signed at Berne on the twenty-second of December, one thousand eight hundred and sixty-four, that the Federal Council accepts such Accession, as well in the name of the Swiss Confederation as in that of the other High Contracting Parties, to whom official communication thereof is given by the present Declaration.

In witness whereof these presents have been signed by the President and the Chancellor of the Confederation, and furnished with the seal of the Federal Council, at Berne the 3rd of March, 1865.

In the name of the Swiss Federal Council,
The President of the Confederation,
(L.S.) SCHENK.
The Chancellor of the Confederation,
SCHIESS.

Martens, Nouveau, Recueil General des Traites. Tom. XVIII, p. 607.

Articles additionnels à la Convention de Genève du 22 août 1864 ; signés à Genève, le 20 Octobre 1868 [1].

Les Gouvernements de l'Allemagne du Nord, de l'Autriche, Bade, la Bavière, la Belgique, le Danemark, la France, la Grande-Bretagne, l'Italie, les Pays-Bas, Suède et Norvége, la Suisse, la Turquie, le Wurtemberg,

désirant étendre aux armées de mer les avantages de la Convention conclue à Genève, le 22 août 1864, pour l'amélioration du sort des militaires blessés dans les armées en campagne, et préciser d'avantage quelquesunes des stipulations de la dite Convention, ont nommé pour leurs Commissaires :

1. Allemagne du Nord.

Le Sieur Henri de Rœder, Lieutenant-Général, Envoyé

[1] Ces articles ont été approuvés par tous les Etats signataires de la Convention de 1864, à l'exception des anciens Etats pontificaux.

extraordinaire et Ministre plénipotentiaire de Sa Majesté le Roi de Prusse et de la Confédération de l'Allemagne du Nord près la Confédération suisse, Chevalier de l'aigle rouge, 2de. classe, etc., etc.

Le Sieur Frédéric Lœffler, Médecin général de l'armée, Professeur de médecine militaire, Chevalier de l'ordre de la Couronne, 2de. classe, croisé d'épées, etc., etc.

Le Sieur Henry Köhler, Capitaine de vaisseau, Chef de section au ministère de la Marine, Chevalier de l'Ordre de la Couronne, 3me. classe, etc., etc.

2. Autriche.

Le Sieur Jaromir, baron Mundy, Docteur en médecine et chirurgie, Médecin-Major de première classe, Commandeur de l'ordre de S. M. l'Empereur François-Joseph d'Autriche, Roi de Hongrie.

3. Bade.

Le Sieur Adolphe Steiner, Médecin d'État-Major, Chevalier de 1re. classe de l'ordre du Lion de Zæhringen, avec feuille de Chêne.

4. Bavière.

Le Sieur Théodore Dompierre, Médecin principal de 1re. classe, Chevalier de l'ordre de St. Michel.

5. Belgique.

Le Sieur August Visschers, conseiller au Conseil des mines de Belgique, officier de l'ordre de Léopold.

6. Danemark.

Le Sieur John Barthélemy Gaïfre Galiffe, Docteur en droit, Consul de S. M. le Roi de Danemark près la Confédération suisse, Chevalier de l'ordre de Danebrog et de celui des S. S. Maurice et Lazare.

7. France.

Le Sieur Auguste Coupvent des Bois, Contre-Amiral, Commandeur de l'ordre impérial de la Légion d'honneur, etc., etc.

Le Sieur Henry Eugène Seguineau de Préval, sousintendant

militaire, de 1re. classe, officier de l'ordre impérial de la Légion d'honneur, etc., etc.

8. Grande-Bretagne.

Le Sieur John Savile Lumley, Envoyé extraordinaire et Ministre plénipotentiaire de Sa Majesté Britannique près la Confédération suisse.

Le Sieur Hastings Reginald Yelverton, Contre-Amiral au service de S. M. Britannique, Compagnon de l'ordre du Bain.

9. Italie.

Le Sieur Félix Baroffio, médecin-directeur, Chevalier de l'ordre des S. S. Maurice et Lazare, de l'ordre de la Couronne d'Italie.

Le Sieur Paul Cottrau, Capitaine de frégate, Chevalier de l'ordre des S. S. Maurice et Lazare, décoré de la médaille d'argent à la Valeur Militaire.

10. Pays-Bas.

Le Sieur Jonkeer Hermann Adrien van Karnebeck, Vice-Amiral, Aide-de-camp en service extraordinaire de S. M. le Roi des Pays-Bas, décoré des ordres militaire et civil et des croix et médailles de 1815, de 1830 Néerlandais et des campagnes de Java, Grand-Croix de l'ordre militaire du Christ et de celui de Tunis, Grand-Officier de l'ordre de Charles III d'Espagne, Commandeur des ordres de St. Anne en diamant de Russie, de Léopold de Belgique et du Faucon de Saxe-Weimar, Chevalier de la Légion d'honneur, décoré de la médaille de St. Hélène.

Le Sieur Bernhard Ortuinus Théodore Henri Westenberg, docteur en droit, Conseiller de Légation de S. M. le Roi des Pays-Bas, Commandeur de la Couronne de Chêne, Grand Commandeur, de l'ordre de St. Michel de Bavière, Chevalier de l'ordre de Charles III d'Espagne, de la Couronne de Prusse, du Danebrog de Danemark et d'Adolphe de Nassau.

11. Suède et Norvége.

Le Sieur Ferdinand Nathanaël Staaf, Lieutenant Colonel, attaché militaire de la Légation de Suède et de Norvége à Paris, Chevalier des ordres royaux de l'Epée de Suède et

de Saint-Olaf de Norvége, officier de l'ordre impérial de la Légion d'honneur, ainsi que de l'instruction publique en France, Chevalier de l'ordre impérial de la Couronne de fer d'Autriche, etc., etc.

12. Suisse.

Le Sieur Guillaume Henri Dufour, ancien général en chef de l'armée fédérale, Grand' Croix de la Légion d'honneur;

Le Sieur Gustave Moynier, Président du Comité international de secours pour les militaires blessés, officier de l'ordre des S. S. Maurice et Lazare, Chevalier de 1re. Classe de l'Ordre du Lion de Zæhringen, Chevalier des Ordres de l'Étoile polaire et de Notre-Dame de la conception de Villa-Viçosa, etc., etc.;

Le Sieur Samuel Lehmann, Colonel fédéral, médecin en chef de l'armée fédérale, membre du Conseil National.

13. Turquie.

Husny Effendi, Major, attaché militaire à l'Ambassade de Turquie à Paris, décoré de l'ordre impérial du Medjidié de 5me. classe.

14. Wurtemberg.

Le Sieur Christophe Hahn, Docteur en philosophie et théologie, membre de la direction centrale pour les établissements de bienfaisance, Président du Comité wurtembergeois pour les militaires blessés, Chevalier des Ordres de Frédéric et des S. S. Maurice et Lazare.

Le Sieur Édouard Fichte, Docteur en médecine, médecin principal de l'armée wurtembergeoise, Chevalier de l'Ordre de Frédéric et de l'Ordre de la Couronne de Prusse de 3me. classe;

Lesquels dûment autorisés à cet effet, sont convenus, sous réserve d'approbation de leurs Gouvernements, des dispositions suivantes:

Art. 1er. Le personnel désigné dans l'article deux de la Convention continuera, après l'occupation par l'ennemi, á donner, dans la mesure des besoins, ses soins aux malades et aux blessés de l'ambulance ou de l'hôpital qu'il dessert.

Lorsqu'il demandera à se retirer, le commandant des troupes occupantes fixera le moment de ce départ, qu'il ne pourra

toutefois différer que pour une courte durée en cas de nécessités militaires.

Art. 2. Des dispositions devront être prises par les Puissances belligérantes pour assurer au personnel neutralisé, tombé entre les mains de l'armée ennemie, la jouissance intégrale de son traitement.

Art. 3. Dans les conditions prévues par les articles un et quatre de la Convention, la dénomination d'ambulance s'applique aux hôpitaux de campagne et autres établissements temporaires qui suivent les troupes sur les champs de bataille pour y recevoir des malades et des blessés.

Art. 4. Conformément à l'esprit de l'article cinq de la Convention et aux réserves mentionnées au Protocole de 1864, il est expliqué que pour la répartition des charges relatives au logement de troupes et aux contributions de guerre, il ne sera tenu compte que dans la mesure de l'équité du zèle charitable déployé par les habitants.

Art. 5. Par extension de l'article six de la Convention, il est stipulé que sous la réserve des officiers dont la possession importerait au sort des armes, et dans les limites fixées par le deuxième paragraphe de cet article, les blessés tombés entre les mains de l'ennemi, lors même qu'ils ne seraient pas reconnus incapables de servir, devront être renvoyés dans leur pays après leur guérison, ou plus tôt si faire se peut, à la condition toutefois de ne pas reprendre les armes pendant la durée de la guerre.

Articles concernant la Marine.

Art. 6. Les embarcations qui, à leurs risques et périls, pendant et après le combat, recueillent ou qui, ayant recueilli des naufragés ou des blessés, les portent à bord d'un navire soit neutre, soit hospitalier, jouiront jusqu'à l'accomplissement de leur mission de la part de neutralité que les circonstances du combat et la situation des navires en conflit permettront de leur appliquer.

L'appréciation de ces circonstances est confiée à l'humanité de tous les combattants.

Les naufragés et les blessés ainsi recueillis et sauvés ne pourront servir pendant la durée de la guerre.

Art. 7. Le personnel religieux, médical et hospitalier de

tout bâtiment capturé, est déclaré neutre. Il emporte, en quittant le navire, les objets et les instruments de chirurgie qui sont sa propriété particulière.

Art. 8. Le personnel désigné dans l'article précédent doit continuer à remplir ses fonctions sur le bâtiment capturé, concourir aux évacuations de blessés faites par le vainqueur, puis il doit être libre de rejoindre son pays, conformément au second paragraphe du premier article additionnel ci-dessus.

Les stipulations du deuxième article additionnel ci-dessus sont applicables au traitement de ce personnel.

Art. 9. Les bâtiments hôpitaux militaires restent soumis aux lois de la guerre, en ce qui concerne leur matériel; ils deviennent la propriété du capteur, mais celui-ci, ne pourra les détourner de leur affection spéciale pendant la durée de la guerre.

Art. 10. Tout bâtiment de commerce, à quelque nation qu'il appartienne, chargé exclusivement de blessés et de malades dont il opère l'évacuation, est couvert par la neutralité; mais le fait seul de la visite, notifié sur le journal du bord, par un croiseur ennemi, rend les blessés et les malades incapables de servir pendant la durée de la guerre. Le croiseur aura même le droit de mettre à bord un commissaire pour accompagner le convoi et vérifier ainsi la bonne foi de l'opération.

Si le bâtiment de commerce contenait en outre un chargement, la neutralité le couvrirait encore pourvu, que ce chargement ne fût pas de nature à être confisqué par le belligérant.

Les belligérants conservent le droit d'interdire aux bâtiments neutralisés toute communication et toute direction, qu'ils jugeraient nuisibles au secret de leurs opérations.

Dans les cas urgents, des conventions particulières pourront être faites entre les commandants en chef pour neutraliser momentanément d'une manière spéciale les navires destinés à l'évacuation des blessés et des malades.

Art. 11. Les marins et les militaires embarqués, blessés ou malades, à quelque nation qu'ils appartiennent, seront protégés et soignés par les capteurs.

Leur repatriement est soumis aux prescriptions de l'article six de la Convention et de l'article cinq additionnel.

Art. 12. Le drapeau distinctif à joindre au pavillon national pour indiquer un navire ou une embarcation quelconque qui réclame le bénéfice de la neutralité, en vertu des principes de cette Convention, est le pavillon blanc à croix rouge.

Les belligérants exercent à cet égard toute vérification, qu'ils jugent nécessaire.

Les bâtiments hôpitaux militaires seront distingués par une peinture extérieure blanche avec batterie verte.

Art. 13. Les navires hospitaliers, équipés aux frais des sociétés de secours reconnues par les Gouvernements signataires de cette Convention, pourvus de commission émanée du Souverain qui aura donné l'autorisation expresse de leur armement, et d'un document de l'autorité maritime compétente, stipulant qu'ils ont été soumis à son contrôle pendant leur armement et à leur départ final, et qu'ils étaient alors uniquement appropriés au but de leur mission, seront considérés comme neutres ainsi que tout leur personnel.

Ils seront respectés et protégés par les belligérants.

Ils se feront reconnaître en hissant, avec leur pavillon national, le pavillon blanc à croix rouge. La marque distinctive de leur personnel dans l'exercice de ses fonctions sera un brassard aux mêmes couleurs; leur peinture extérieure sera blanche avec batterie rouge.

Ces navires porteront secours et assistance aux blessés et aux naufragés des belligérants sans distinction de nationalité.

Ils ne devront gêner en aucune manière les mouvements des combattants.

Pendant et après le combat, ils agiront à leurs risques et périls.

Les belligérants auront sur eux le droit de contrôle et de visite; ils pourront refuser leur concours, leur enjoindre de s'éloigner, et les détenir si la gravité des circonstances l'exigeait.

Les blessés et les naufragés recueillis par ces navires ne pourront être réclamés par aucun des combattants, et il leur sera imposé de ne pas servir pendant la durée de la guerre.

Art. 14. Dans les guerres maritimes, toute forte présomption, que l'un des belligérants profite du bénéfice de la neu-

tralité dans un autre intérêt que celui des blessés et des malades, permet à l'autre belligérant, jusqu'à preuve du contraire, de suspendre la Convention à son égard.

Si cette présomption devient une certitude, la Convention peut même lui être dénoncée pour toute la durée de la guerre.

Art. 15. Le présent acte sera dressé en un seul exemplaire original, qui sera déposé aux archives de la Confédération Suisse.

Une copie authentique de cet Acte sera délivrée, avec l'invitation d'y adhérer, à chacune des Puissances signataires de la Convention du 22 Août 1864, ainsi qu'à celles qui y ont successivement accédé.

En foi de quoi les Commissaires soussignés ont dressé le présent Projet d'articles additionnels et y ont apposé le cachet de leurs armes.

Fait à Genève, le vingtième jour du mois d'Octobre de l'an mil huit cent soixante-huit.

Von Roeder.	D. Felice Baroffio.
F. Loffler.	Paolo Cottrau.
Kohler.	H. A. van Karnebeek.
Dr. Mundy.	Westenberg.
Steiner.	F. N. Staaff.
Dr. Dompierre.	G. H. Dufour.
Visschers.	G. Moynier.
J. B. G. Galiffe.	Dr. S. Lehmann.
A. Coupvent des Bois.	Husny.
H. de Preval.	Dr. C. Hahn.
John Savile Lumley.	Dr. Fichte.
H. R. Yelverton.	

(Translation.)

Article I.

The persons designed in Article II of the Convention shall continue after occupation by the enemy to give their services, according to the measure of the necessities, to the sick and the wounded of the ambulance or hospital, which they serve.

When they shall make a demand to withdraw, the commander of the occupying forces shall fix the moment of their departure, which he cannot under any circumstances delay, except for a short period in case of military necessities.

ARTICLE II.

Dispositions ought to be made by the belligerent Powers to assure to the persons neutralised, who may fall into the hands of the enemy-army, the complete enjoyment of their appointments.

ARTICLE III.

In the conditions provided for by Articles I and IV of the Convention, the denomination of ambulance applies to country-hospitals and other temporary establishments, which follow the troops on the field of battle to receive there the sick and the wounded.

ARTICLE IV.

Conformably to the spirit of Article V of the Convention and under the reserves mentioned in the Protocol of 1864, it is explained, that as regards the division of the charges relative to the lodgment of troops and the contributions of war, account will only be taken in an equitable degree of the charitable zeal exhibited by the inhabitants.

ARTICLE V.

In extension of Article VI of the Convention, it is stipulated that with the reservation of officers, the detention of whom may be of importance to the success of the war, and within the limits fixed by the second paragraph of this article, the wounded who have fallen into the hands of the enemy, although they may not have been recognised as incapable of service, ought to be sent back to their country after their wounds are healed, or sooner if it be possible, on condition always of not resuming their arms during the continuance of the war.

Articles concerning the Marine.

ARTICLE VI.

The boats, which at their risk and peril, during and after

the combat, pick up, or which having picked up the shipwrecked or the wounded, convey them on board of a neutral or hospital ship, shall enjoy until the completion of their mission such a degree of neutrality as the circumstances of the combat and the situation of the vessels in conflict will allow to be applied to them.

The appreciation of the circumstances is confided to the humanity of all the combatants.

The shipwrecked and the wounded persons so picked up and saved cannot serve during the continuance of the war.

ARTICLE VII.

Every person employed in the religious, medical or hospital service of any captured vessel is declared neutral. In quitting the vessel, he carries away the articles and the instruments of surgery, which are his private property.

ARTICLE VIII.

Every person designated in the preceding article ought to continue to fulfill his functions on board of the captured vessel, to assist in the evacuations of the wounded made by the victorious party, after which he ought to be free to rejoin his country, conformably to the second paragraph of the first additional article above-mentioned.

The stipulations of the second additional article above-mentioned are applicable to the treatment of these persons.

ARTICLE IX.

Military hospital-vessels remain subject to the laws of war, in what regards their equipment, they become the property of the captor, but the latter cannot divert them from their special occupation during the continuance of the war.

ARTICLE X.

Every vessel of commerce, to whatever nation it may belong, laden exclusively with wounded or sick people, whose evacuation it is effecting, has the protection of neutrality, but the fact alone of a visit, notified in her log book by an enemy cruiser, renders the wounded and the sick incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board a commissioner to

accompany the convoy and to verify in this manner the good faith of the operation.

If the vessel of commerce should contain besides a cargo, the neutral character shall still protect it, provided that the cargo be not of a nature to be confiscated by the belligerent.

Belligerents retain the right of interdicting to neutralised vessels all communication and all direction, which they shall judge to be prejudicial to the secrecy of their operations.

In urgent cases, special conventions may be made between the commanders-in-chief to neutralise temporarily in a special manner ships intended for the evacuation of the wounded or of the sick.

ARTICLE XI.

Mariners and soldiers embarked [in such vessels] wounded or sick, to whatever nation they may belong, shall be protected and taken care of by the captors.

Their restoration to their country is made subject to the provisions of the sixth article of the Convention and the fifth additional article.

ARTICLE XII.

The distinctive flag to be joined to the national flag to denote a ship or a boat of any kind, which claims the benefit of neutrality in virtue of the principles of this Convention, is the white flag with a red cross.

Belligerents exercise in this respect all such verification, as they judge necessary.

Military hospital-vessels shall be distinguished by white external painting with a green battery.

ARTICLE XIII.

Hospital ships, equipped at the expense of associations of succour recognised by the governments which have signed this Convention, being provided with a commission issued by the sovereign, who shall have expressly authorised their fitting out, and with a document from a competent maritime authority, certifying that they have been submitted to its control during their fitting out and at their final departure, and that they were then appropriated exclusively to the object

of their mission, shall be considered as neutral as well as all the persons employed in them.

They shall be respected and protected by the belligerents.

They shall make themselves known by hoisting with their national flag, the white flag with a red cross. The distinctive mark of the persons employed in them during the exercise of their functions shall be an arm-badge of the same colours: their external painting shall be white with a red battery.

These ships may carry succour and assistance to the wounded and shipwrecked belligerents without distinction of nationality.

They ought not in any way to embarrass the movements of the combatants.

During and after the combat, they shall act at their own risk and peril.

The Belligerents shall have over them the right of control and visit; they may refuse their assistance, may enjoin them to remove to a distance and may detain them, if the gravity of the circumstances require it.

The wounded and shipwrecked, picked up by these vessels, cannot be reclaimed by any of the combatants, and there shall be imposed on them the obligation of not again serving during the continuance of the war.

ARTICLE XIV.

In maritime wars, any strong presumption, that one of the belligerents profits in the benefit of neutrality in another interest than that of the wounded and the sick, allows the other belligerent, until proof of the contrary, to suspend the Convention as regards him.

If this presumption becomes a certainty, the Convention may be denounced as regards him during the continuance of the war.

ARTICLE XV.

The present Act shall be drawn up in a single original Act, which shall be deposited in the archives of the Swiss Confederation.

An authentic copy of this Act shall be delivered with an invitation to accede thereto to each of the Powers who have signed the Convention of 22 August 1864, as likewise to those, who have successively acceded to it.

In faith of which the undersigned Commissioners have drawn up the present project of Additional Articles and have affixed thereto the seal of their arms.

Done at Geneva the twentieth day of the month of October in the year eighteen hundred and sixty eight.

(Here follow the signatures.)

CIRCULAIRE du Conseil Fédéral Suisse aux Gouvernements signataires de la Convention de Genève, concernant l'article 9 additionnel du 20 Octobre 1868; en date de Berne, le 16 Décembre 1868 [1].

Berne, le 16 Décembre 1868.

Par note du 23 octobre/30 novembre dernier, le Conseil fédéral suisse a eu l'honneur de donner au Gouvernement ... connaissance des résultats de la Conférence de Genève, concernant l'extension de la Convention pour l'amélioration du sort des militaires blessés. Une communication, que lui a transmise ultérieurement le Gouvernement Impérial de France, oblige le Conseil fédéral à faire à cet égard une ouverture supplémentaire.

Le Gouvernement Impérial désire en première ligne qu'il soit apporté une modification à l'article 9 des articles additionnels récemment adoptés sous réserve de ratification et auxquels il déclare d'ailleurs être prêt à adhérer. Il s'exprime de la manière suivante sur cette modification:

"L'article 9 additionnel de ce projet propose de stipuler que les bâtiments hôpitaux militaires resteront soumis aux lois de la guerre, en ce qui concerne leur matériel, et qu'ils deviendront la propriété du capteur, à la condition toutefois que celui-ci ne pourra les détourner de leur affectation spéciale pendant la durée de la guerre. Le Ministre de la Marine de l'Empire a pensé que cette disposition s'écarterait de l'esprit de la Convention de 1864 en privant dans tous les cas

[1] La proposition du Gouvernement français relative à l'article 9 additionnel et contenue dans cette circulaire a été acceptée par tous les États signataires de la Convention de 1864, à l'exception des anciens États pontificaux.

les armées navales de la faculté de se faire accompagner par des navires hôpitaux jouissant du bénéfice de la neutralité. Il a, dans ce but, et tout en maintenant la rédaction de l'art. 9, proposé de compléter cet article par un paragraphe additionnel ainsi conçu :

> "'Toutefois, les navires impropres au combat que, pendant la paix, les Gouvernements auront officiellement déclaré être destinés à servir d'hôpitaux maritimes flottants, jouiront, pendant la guerre, de la neutralité complète au matériel comme au personnel, pourvu que leur armement soit uniquement approprié à leur destination spéciale.'"

Le Conseil fédéral estime que l'amendement proposé par le Gouvernement français constitue effectivement une amélioration de l'art. 9 ; il croit donc pouvoir le recommander à l'acceptation du Gouvernement . . . . .

Le Gouvernement Impérial déclare ensuite qu'il ne considérera les articles additionnels comme ayant force et vigueur que quand tous les États qui ont adhéré à la Convention de Genève les auront adoptés avec l'amendement qu'il propose. Il se réfère à cet égard aux déclarations données par les délégués français à la Conférence de Genève et qu'il considère comme étant conformes aux usages diplomatiques. "Il est incontestable, dit-il, que des articles additionnels à une Convention internationale ne peuvent être conclus qu'avec l'assentiment de toutes les Puissances contractantes, soit qu'elles aient signé la Convention principale, ou qu'elles y aient postérieurement adhéré."

Bien qu'il puisse concevoir des divergences d'opinion sur ce point, le Conseil fédéral croit devoir actuellement se borner à porter la déclaration du Gouvernement Français à la connaissance du Gouvernement . . . . en exprimant l'espoir que par des déclarations unanimes d'adhésion on évite tout débat ultérieur sur la question soulevée.

Nous désirons vivement que les Gouvernements européens, écartant des scrupules d'une nature toute secondaire, continuent à coopérer tous ensemble à cette œuvre humanitaire, et nous saisissons, etc.

Le Conseil Fédéral etc.

NOTE adressée par le Principal Secrétaire d'Etat pour les affaires étrangères de la Grande-Bretagne à l'Ambassadeur de France à Londres, relativement à l'interprétation de l'article 10 additionnel à la Convention de Genève; en date de Londres, le 21 Janvier 1869.

Foreign Office, January 21, 1869.

M. l'Ambassadeur,

Her Majesty's Government have taken into consideration your Excellency's note of the 15th ultimo, in which, with reference to the Draft of Articles prepared by the Conference which met at Geneva in the month of October last, and intended as Additional Articles to the Convention of 1864, for the amelioration of the treatment of the wounded in time of war, your Excellency states that the Government of the Emperor is desirous of adding a paragraph, in the terms set forth in your note, to the 9th of those Articles relating to hospital ships.

I have the honour to acquaint your Excellency, that the paragraph in question appears to Her Majesty's Government to be unobjectionable.

But, before signifying their approval of the Additional Articles, Her Majesty's Government would be glad to ascertain what is the precise interpretation which the Government of the Emperor proposes to give to the following provision in the 10th of those Articles:—"Si le bâtiment de commerce contenait en outre un chargement, la neutralité le couvrirait encore, pourvu que ce chargement ne fût pas de nature à être confisqué par le belligérant."

Under the existing practice of nations, if a ship under a cartel has entered the port of an enemy for the purpose of exchanging prisoners, or it may be for the purpose of bringing away sick and wounded, the master would be bound to abstain from all traffic whatever, and any infringement of this rule would work a confiscation of the ship, if captured. Under one interpretation of the passage above recited, the provision would have a limited operation, and its intention

might be held to be, to exempt vessels employed in "évacuations" from capture and confiscation, although the master might have availed himself of the opportunity to bring out cargo, provided the cargo was not contraband of war. The words "la neutralité le couvrirait encore" on this hypothesis would mean, that neutrality would still cover it, that is, the vessel.

Under another interpretation the passage might be held to give protection to the cargo as well as to the vessel; and if it should be so intended, then enemy's goods on board an enemy's ship might be privileged from capture as prize, provided only some sick and wounded persons were on board the vessel. With regard to the proviso, Her Majesty's Government apprehend that the words "pourvu que ce chargement ne fût pas de nature à être confisqué par le belligérant," must be taken to refer to the quality of the goods, as contraband of war or not, and not to their ownership.

There is another point as regards this Article, which may deserve consideration, namely, under what limitations are "evacuations" of the wounded and sick to be made? For instance, as regards evacuations made by sea, is it intended in the case of a blockaded town, that a vessel may come out of the port with sick and wounded, and be privileged from capture? It might be desirable, in the interests of humanity, that they should be removed; but under such circumstances their removal would tend to prolong the resistance of the besieged party.

In offering these observations, I am aware that it is possible that I may not have fully appreciated the use of the term "evacuations." But I presume it to mean the removal of the sick and wounded from temporary or permanent hospitals, at the discretion of either belligerent.

I request that your Excellency will have the goodness to communicate this note to the Government of the Emperor, and to state that Her Majesty's Government will feel greatly obliged by being made acquainted with their views upon the subject.

I am, etc. *Clarendon.*

NOTE adressée par l'Ambassadeur de France à Londres au Principal Secrétaire d'Etat pour les affaires étrangères de la Grande-Bretagne, relativement à l'interprétation de l'article 10 additionnel à la Convention de Genève ; en date de Londres, le 26 Février 1869 [1].

Londres, le 26 Février 1869.

M. le Comte,

En m'informant, le 21 janvier dernier, de l'adhésion que le Gouvernement de la Reine avait donnée aux modifications que M. l'Amiral Rigault de Genouilly a proposé d'introduire à l'Article 9 additionnel de la Convention du 22 août 1864, pour le secours aux blessés militaires, votre Excellence m'exprimait le désir d'obtenir des éclaircissements sur le sens précis que le Gouvernement de l'Empereur entendait attribuer à certaines dispositions de l'Article 10 additionnel.

Je viens de recevoir de mon Gouvernement, et je m'empresse de transmettre à votre Excellence, la note explicative ci-jointe. Il en résulte que les stipulations de la Convention de Genève n'ont eu pour objet de modifier sur aucun point les principes généralement admis, en ce qui concerne les droits des belligérants. Il demeure donc entendu, pour le Gouvernement de l'Empereur, que tout navire, porteur de malades ou de blessés, qui aurait à son bord de la contrebande de guerre ou des marchandises ennemies, ne saurait invoquer le bénéfice de la neutralité. Quant au dernier paragraphe de l'Article 10 additionnel, il donne seulement à l'assiégé la faculté d'entrer en pourparlers avec l'assiégeant, pour l'évacuation d'un port bloqué; c'est-à-dire que le fait de l'entrée ou de la sortie d'un navire, ayant pour mission spéciale de transporter des malades et des blessés, ne peut résulter que d'un accord préalable entre les belligérants.

M. le Marquis de Lavalette, en me chargeant de faire cette communication à votre Excellence, exprime l'espoir qu'elle

[1] Cette interprétation de l'article 10 additionnel du 20 Octobre 1868 a été approuvée par tous les États signataires de la Convention de 1864, à l'exception des anciens États Pontificaux.

s'associera à l'interprétation adoptée par le Gouvernement de l'Empereur.

Veuillez etc.

Prince de la Tour d'Auvergne.

Annexe.

NOTE sur l'interprétation de l'article 10 additionnel à la Convention de Genève.

Le deuxième paragraphe de l'article 10 additionnel est ainsi conçu :

"Si le bâtiment de commerce contenait en outre un chargement, la neutralité le couvrirait encore (le bâtiment), pourvu que le chargement ne fût pas de nature à être confisqué par le belligérant."

Les mots "de nature a être confisqué par le belligérant" s'appliquent aussi bien à la nationalité de la marchandise qu'à sa qualité.

Ainsi, d'après les dernières Conventions internationales, les marchandises de nature a être confisquées par un croiseur sont :

1. La contrebande de guerre sous tous les pavillons.
2. La marchandise ennemie sous pavillon ennemi.

Le croiseur ne doit reconnaître la neutralité du navire chargé de blessés que si aucune partie de son chargement ne peut, en vertu des lois internationales, être comprise dans l'une ou l'autre de ces deux catégories de marchandises.

La faculté que donne le paragraphe en question de laisser à bord des navires chargés de blessés une portion de chargement, doit être considérée comme une facilité pour les affrétements, aussi bien qu'un avantage précieux pour les conditions de navigabilité des navires de commerce si défectueuses lorsqu'ils sont uniquement chargés de lest; mais cette faculté ne saurait en rien porter atteinte au droit de confiscation de la cargaison dans les limites fixées par les lois internationales.

Tout navire dont le chargement serait sujet à confiscation par le croiseur dans les circonstances ordinaires n'est donc pas susceptible d'être couvert par la neutralité par le seul fait qu'il porte en outre des malades et des blessés.

Le " navire " et la " cargaison " rentrent alors dans le droit commun de la guerre, lequel n'a été modifié par la Convention qu'en faveur du bâtiment exclusivement chargé de blessés, ou dont le chargement ne serait sujet à confiscation en aucun cas. Ainsi, par exemple, le navire de commerce d'un belligérant chargé de marchandises neutres en même temps que de blessés et de malades, est couvert par la neutralité.

Le navire de commerce d'un belligérant portant, avec des blessés et des malades, des marchandises ennemies du croiseur ou de la contrebande de guerre, n'est pas neutre, et le navire ainsi que la cargaison rentrent dans le droit commun de la guerre.

Un navire neutre portant, avec des blessés et des malades d'un belligérant, de la contrebande de guerre, est soumis au droit commun de la guerre.

Un navire neutre portant des marchandises de toutes nationalités, mais non contrebande de guerre, fait participer les blessés et les malades qu'il porte à sa propre nationalité.

Quant à ce qui concerne la défense expresse faite, d'après l'usage, au navire porteur " d'un cartel " de se livrer à un commerce quelconque au point d'arrivée, on a pensé qu'il n'y avait pas lieu d'y soumettre spécialement les navires chargés de blessés, parce que le deuxième paragraphe de l'Article 10 impose aux belligérants comme aux neutres l'exclusion du transport de marchandises, sujettes à confiscation.

D'ailleurs, si l'un des belligérants abusait de la faculté qui lui est accordée, et sous le prétexte de transports de blessés neutralisait sous son pavillon une intercourse commerciale importante qui pût influer d'une manière notoire sur les chances ou sûr la durée de la guerre, l'Article 14 de la Convention serait à juste titre invoqué par l'autre belligérant.

Quand au second point de la note du Gouvernement britannique relatif à la faculté de faire sortir d'une ville assiégée et bloquée par mer, d'une manière effective, sous le couvert de la neutralitè, des bâtiments chargés de blessés et de malades, de manière à prolonger la résistance des assiégés, la Convention n'autorise point cette faculté. En accordant les bienfaits d'une neutralité, parfois restreinte, aux bâtiments chargés de blessés, elle n'a pu leur donner des droits supérieurs à ceux des autres neutres, qui ne peuvent forcer un blocus effectif sans une autorisation spéciale. L'humanité,

d'ailleurs, dans un cas semblable, ne perd pas tous ses droits, et si les circonstances permettent à l'assiégeant de se relâcher des droits rigoureux du blocus, l'assiégé peut entrer en pourparlers, en vertu du quatrième paragraphe de l'Article 10.

CIRCULAIRE du Conseil Fédéral Suisse aux Gouvernements signataires de la Convention de Genève, concernant l'article 12 additionnel du 20 Octobre 1868; en date de Berne, le 2 Mai 1870[1].

Berne, le 2 Mai 1870.

Le Conseil fédéral suisse a l'honneur d'informer le Ministère des Affaires Étrangères de . . . . que tous les États signataires de la Convention de Genève du 22 août 1864 pour les secours aux blessés militaires ont, à l'exception de l'Espagne[2] et du St. Siège, dont les réponses ne sont pas encore arrivées à Berne, adhéré à l'ensemble des articles additionnels arrêtés par la Conférence de Genève, le 20 octobre 1868, ainsi qu'à la modification de l'article additionnel 9 proposée par la France et à l'interprétation donnée d'un commun accord à l'article additionnel 10 par la France et la Grande-Bretagne.

Mais en constatant l'accord qui existe entre les États contractants au sujet de ces diverses propositions, le Conseil fédéral se voit obligé de soumettre à Son Excellence Monsieur le Ministre des Affaires Étrangères de . . . une nouvelle proposition tendant à modifier une des dispositions additionnelles arrêtées par la Conférence de Genève à la date susindiquée.

Le 9/21 du mois passé, le cabinet de St. Pétersbourg a, par l'entremise de son Ministre plénipotentiaire près la Confédération, attiré l'attention du Conseil fédéral sur ce que

[1] La rédaction du second alinéa de l'article 12, proposée par la Russie, a été approuvée par tous les États signataires de la Convention de 1864, à l'exception de l'Allemagne, de la France, de l'Italie et des anciens États pontificaux. Les Pays-Bas ont proposé de conserver la rédaction primitive et d'y ajouter la disposition formulée par le Gouvernement russe.

[2] L'adhésion de l'Espagne a été déclarée par une note en date de Madrid, le 10 Décembre 1872.

toute la Convention ne contient aucun article pour prévenir l'abus du drapeau distinctif de la neutralité, bien que l'article additionnel 14 indique ce qu'il y aurait à faire dans le cas d'un pareil abus par l'un des belligérants.

Or, faisant valoir qu'il peut arriver un cas où l'usage abusif dudit drapeau aurait une influence sur l'issue du combat et qu'alors il serait évidemment trop tard d'appliquer les mesures contenues dans l'article additionnel 14, le Ministère Impérial de la Marine de Russie propose de faire remplacer le second alinéa de l'article 12 conçu ainsi: "Les belligérants exercent à cet égard tout vérification qu'ils jugent nécessaire"—par la rédaction suivante:

> "A l'exception des navires hospitaliers qui se distinguent par une peinture extérieure spéciale, tout bâtiment de guerre ou de commerce ne peut se servir du pavillon blanc à croix rouge que dans le cas où il en aurait reçu l'autorisation par suite d'une entente préalable des belligérants. En l'absence d'une pareille entente, le bénéfice de la neutralité n'est accordé qu'à ceux des navires, dont le pavillon neutre tel qu'il est établi pour les bâtiments hospitaliers a été hissé avant qu'ils ne fussent aperçus par l'ennemi."

Le Ministère Impérial de la marine exprime la pensée, que la modification qu'il propose porte sur un sujet trop sérieux pour ne pas mériter de la part des parties contractantes la même attention qu'elles ont accordée aux modifications proposées par la France et l'Angleterre, et il témoigne le désir que ses observations soient portées à la connaissance de qui de droit.

Conformément à ce désir, le Conseil fédéral a donc décidé de soumettre la proposition du Ministère Impérial de Russie à l'approbation de tous les États signataires et il prie Son Excellence Monsieur le Ministre des Affaires Étrangères de... de vouloir bien employer ses bons offices pour que Son Gouvernement lui fasse parvenir sa déclaration le plus tôt que faire se pourra.

En exprimant l'espoir que les hautes parties contractantes, pénétrées comme lui du désir de voir l'œuvre de la Conférence de Genève enfin consacrée par une entente définitive, n'hésiteront pas à accéder à la demande du Ministère Impérial de la marine de Russie, le Conseil Fédéral Suisse a l'honneur d'offrir

à Son Excellence Monsieur le Ministre des Affaires Étrangères de . . . . l'assurance de sa haute considération.

Au nom du Conseil Fédéral Suisse,

Le Président de la Confédération :

Dubs.

Le Chancelier de la Confédération :

Schiess.

DECLARATION relative à l'interdiction des balles explosibles en temps de guerre; echangée à Saint Pétersbourg, le 11 Decembre 1868, entre l'Autriche, la Bavière, la Belgique, le Danemark, la France, la Grande-Bretagne, la Grèce, l'Italie, les Pays Bas, la Perse, le Portugal, la Prusse et la Confédération de l'Allemagne du Nord, la Russie, la Suède et la Norwége, la Suisse, la Turquie, et le Wurtemberg.

Sur la proposition du Cabinet Impérial de Russie, une Commission Militaire Internationale ayant été réunie à St. Pétersbourg, afin d'examiner la convenance d'interdire l'usage de certains projectiles en tems de guerre entre les nations civilisées, et cette Commission ayant fixé d'un commun accord les limites techniques où les nécessités de la guerre doivent s'arrêter devant les exigences de l'humanité, les Soussignés sont autorisés par les ordres de leurs Gouvernements à déclarer ce qui suit :

Considérant que les progrès de la civilisation doivent avoir pour effet d'atténuer autant que possible les calamités de la guerre ;

Que le seul but légitime que les Etats doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi ;

Qu'à cet effet, il suffit de mettre hors de combat le plus grand nombre d'hommes possible ;

Que ce but serait dépassé par l'emploi d'armes qui aggra-

veraient inutilement les souffrances des hommes mis hors de combat, ou rendraient leur mort inévitable;

Que l'emploi de pareilles armes serait dès lors contraire aux lois de l'humanité;

Les Parties Contractantes s'engagent à renoncer mutuellement, en cas de guerre entre elles, à l'emploi par leurs troupes de terre ou de mer, de tout projectile d'un poids inférieur à 400 grammes, qui serait ou explosible ou chargé de matières fulminantes ou inflammables.

Elles inviteront tous les Etats, qui n'ont pas participé par l'envoi de Délégués aux délibérations de la Commission Militaire Internationale réunie à St. Pétersbourg, à accéder au présent engagement.

Cet engagement n'est obligatoire que pour les Parties Contractantes ou Accédantes en cas de guerre entre deux ou plusieurs d'entre elles: il n'est pas applicable vis-à-vis de Parties non-Contractantes ou qui n'auraient pas accédé.

Il cesserait également d'être obligatoire du moment où, dans une guerre entre Parties Contractantes ou Accédantes, une partie non-Contractante, ou qui n'aurait pas accédé, se joindrait à l'un des belligérants.

Les Parties Contractantes ou Accédantes se réservent de s'entendre ultérieurement toutes les fois qu'une proposition précise serait formulée en vue des perfectionnements à venir que la science pourrait apporter dans l'armement des troupes, afin de maintenir les principes, qu'elles ont posés et de concilier les nécessités de la guerre avec les lois de l'humanité.

Fait à St. Pétersbourg, le vingt-neuf Novembre / onze, Décembre, mil huit cent soixante-huit.

Pour la Grande Bretagne .	ANDREW BUCHANAN.
„ l'Autriche et la Hongrie	VETSERA.
„ la Bavière . . .	COMTE DE TAUFFKIRCHEN.
„ la Belgique . .	COMTE ERREMBAULT DE DUDZEELE.
„ le Danemarck . .	LE CHAMBELLAN E. VIND.
„ la France . . .	LE BARON TALLEYRAND-PERIGORD.
„ la Grèce . . .	METAXA.
„ l'Italie . . .	LE MARQUIS DI BELLA CARACCIOLO.
„ les Pays Bas . .	LE BARON GEVERS.

Pour la Perse . . .	MIRZA ASSEDULLAH KHAN.
„ le Portugal . .	LE VICOMTE DE RILVAS.
„ la Prusse et la Confédération de l'Allemagne du Nord . . .	H. VII. PRINCE DE REUSS.
„ la Russie . . .	LE PRINCE DE GORTCHACOW.
„ la Suède et la Norwége	LE GENERAL DE BJORNSTJERNA.
„ la Suisse . . .	AD. GLINZ.
„ la Turquie . .	CARATHEODORY.
„ le Wurtemberg . .	D'ABELE.

(Translation.)

Declaration.

On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburgh in order to examine into the expediency of forbidding the use of certain projectiles in times of war between civilised nations, and that Commission having by common agreement fixed the technical limits, at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:—

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object, which States should endeavour to accomplish during war, is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms, which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in

case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St. Petersburgh, by sending Delegates thereto, to accede to the present engagement.

This engagement is obligatory only upon the Contracting or Acceding Parties thereto, in case of war between two or more of themselves: it is not applicable with regard to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be obligatory from the moment when, in a war between Contracting or acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding, whenever a precise proposition shall be drawn up in view of future improvements, which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

Done at St. Petersburgh, the twenty-ninth of November / eleventh of December, one thousand eight hundred and sixty-eight.

For Great Britain . .	ANDREW BUCHANAN.
„ Austria and Hungary .	VETSERA.
„ Bavaria . . .	COUNT TAUFFKIRCHEN.
„ Belgium . . .	COUNT ERREMBAULT DE DUDZEELE.
„ Denmark . . .	E. VIND.
„ France . . .	TALLEYRAND.
„ Greece . . .	S. A. METAXA.
„ Italy	BELLA CARACCIOLO.
„ Netherlands . .	BARON GEVERS.
„ Persia	MIRZA ASSEDULLAH KHAN.
„ Portugal . . .	RILVAS.
„ Prussia and North German Confederation .	H. VII v. REUSS.
„ Russia . . .	GORTCHACOW.
„ Sweden and Norway .	O. M. BJORNSTJERNA.

For Switzerland . . AD. GLINZ.
„ Turkey . . . CARATHEODORY.
„ Wurtemberg . . C. V. ABELE.

Martens Recueil Général de Traités, Tom. XVIII. p. 450.

PROTOCOLS OF THE CONFERENCES OF LONDON of 17 January—14 March, 1871, to which is annexed the recognition by the Plenipotentiaries of the Seven Powers, represented at the said Conferences, that it is an essential principle of the Law of Nations that no Power can release itself from the engagements of a Treaty, or modify its stipulations, unless with the assent of the contracting parties by means of an amicable understanding.

PROTOCOLS of Conferences held in London respecting the Treaty of March 30, 1856.

Protocole No. 1.—Séance du 17 Janvier, 1871.

PRÉSENTS:—Pour l'Allemagne du Nord—M. le Comte de Bernstorff, &c.; Pour l'Autriche-Hongrie—M. le Comte d'Apponyi, &c.; Pour la Grande Bretagne—M. le Comte Granville, &c.; Pour l'Italie—M. le Chevalier Ch. Cadorna, &c.; Pour la Russie—M. le Baron de Brunnow, &c.; Pour la Turquie—Musurus Pacha, &c.

MM. les Plénipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande Bretagne, de l'Italie, de la Russie, et de la Turquie, se sont réunis aujourd'hui en Conférence au Foreign Office.

La séance est ouverte par son Excellence Musurus Pacha, qui propose que la Présidence de la Conférence soit confiée à M. le Comte Granville dans les termes suivants:—

"Messieurs,—Réunis en Conférence pour l'examen d'une question de haute importance, notre premier devoir est de procéder au choix de notre Président. Comme vous avez bien voulu me permettre de prendre la parole à cette occasion, j'ai l'honneur de vous proposer de confier la Présidence de cette

Assemblée à son Excellence le Comte Granville, Principal Secrétaire d'Etat de Sa Majesté la Reine pour les Affaires Etrangères.

"Non seulement c'est un hommage dû à l'auguste Souveraine sous les auspices de qui nous sommes appelés à remplir une importante mission; mais c'est en même temps un témoignage de la confiance qu'inspirent à nos Gouvernements et à nous tous les éminentes qualités qui rendent le noble Lord si propre à imprimer la meilleure direction aux travaux de la Conférence, et la sollicitude éclairée avec laquelle il s'est appliqué, dès le début de l'incident dont nous allons nous occuper, à ouvrir la voie à une solution conforme au droit et au vœu général pour la conservation de la paix."

Cette proposition ayant été adoptée à l'unanimité, M. le Comte Granville prend la Présidence, et s'exprime ainsi:—

"Je m'empresse de remercier l'Ambassadeur de Turquie de la bienveillance avec laquelle il a formulé la proposition que vous, MM. les Plénipotentiaires, avez bien voulu agréer.

"Je vous propose, MM. les Plénipotentiaires, de confier à M. Stuart le rédaction des Protocoles de la Conférence."

Cette proposition ayant été également agréée, M. Stuart est introduit, et MM. les Plénipotentiaires procèdent à la vérification de leurs pouvoirs respectifs, qui sont trouvés en bonne et due forme.

M. le Comte Granville reprend alors la parole:—

"Je suis profondément sensible," dit-il, "à l'honneur que vous me faites en m'appelant à présider cette Conférence.

"Au moment de commencer la discussion d'une grande question Européenne à laquelle la France est fortement intéressée, et pour laquelle elle a fait dans le tems de grands sacrifices, je ne puis qu'exprimer tous mes regrets, auxquels je suis convaincu, MM. les Plénipotentiaires, que vous vous associez, de ne pas la voir représentée aujourd'hui parmi nous.

"Mais M. Jules Favre, désigné comme Plénipotentiaire de la France, ne pouvant se rendre à la réunion d'aujourd'hui, il ne me reste qu'à vous proposer de constater d'un commun accord le vœu que le Plénipotentiaire Français adhère éventuellement à toute décision à prendre dans cette séance, et qu'il me soit permis de communiquer confidentiellement à M. le Chargé d'Affaires de France les détails de nos travaux d'aujourd'hui."

MM. les Plénipotentiaires ayant déclaré leur parfait accord sur ces points, M. le Comte Granville continue :—

"La Conférence a été acceptée par toutes les Puissances cosignataires du Traité de 1856, dans le but d'examiner sans aucun parti pris, et de discuter avec une parfaite liberté, les propositions que la Russie désire nous faire par rapport à la révision qu'elle demande des stipulations du dit Traité, quant à la neutralisation de la Mer Noire.

"Cette unanimité fournit une preuve éclatante que les Puissances reconnaissent que c'est un principe essentiel du droit des gens qu'aucune d'elles ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale.

"Ce principe important me paraît recevoir une adhésion générale, et j'ai l'honneur de vous proposer, MM. les Plénipotentiaires, de signer un Protocole *ad hoc*."

Le Protocole dont il est question est alors présenté à la Conférence et signé par tous les Plénipotentiaires, qui décident en outre qu'il sera annexé au Protocole général de la séance actuelle, et que dès son arrivée M. le Plénipotentiaire de France sera prié d'y ajouter sa signature.

Après avoir exprimé combien il partage les regrets de M. le Président de ne pas voir la France représentée dans la réunion d'aujourd'hui, M. le Plénipotentiaire de Turquie déclare qu'il a adhéré au nom de son Gouvernement au principe formulé par M. le Président avec d'autant plus d'empressement que la Sublime Porte en a de tout temps reconnu le caractère sacré, et qu'elle y a constamment conformé sa politique dans ses relations avec les nations étrangères.

M. le Plénipotentiaire de l'Autriche-Hongrie dit que le Gouvernement Impérial et Royal n'a pas hésité à accepter la réunion de cette Conférence, appelée à donner un nouveau gage à la foi des Traités et aux principes ainsi qu'aux intérêts qu'ils sont destinés à sauvegarder.

Il ajoute que c'est dans un esprit de conciliation et d'appréciation équitable que le Gouvernement de Sa Majesté Impériale et Royale Apostolique l'a chargé d'entrer dans l'examen des questions qui vont occuper la Conférence. Ces sentiments sont d'autant plus conformes aux intentions du Gouvernement Austro-Hongrois qu'il y voit le moyen de constater une

fois de plus, à la suite d'un examen impartial, l'accord des Puissances sur les graves questions qui font l'objet du Traité signé à Paris le 30 Mars, 1856.

M. le Plénipotentiaire d'Italie se réjouit de l'accord des Puissances résultant du Protocole qu'on vient de signer, et des déclarations de MM. les Plénipotentiaires, auxquels il s'empresse de se joindre. L'Italie sera heureuse de prêter son concours loyal à l'œuvre importante et d'intérêt général pour laquelle la Conférence se trouve réunie, et d'y porter le plus grand esprit d'équité et de conciliation.

Sur l'invitation de M. le Président, M. le Plénipotentiaire de Russie a pris la parole Il demande à la Conférence la permission de donner lecture d'un résumé dont il désire l'insertion dans le Protocole :—

"M. le Plénipotentiaire de Russie a résumé les circonstances et les faits qui, depuis la signature du Traité conclu à Paris, le $\frac{18}{30}$ Mars, 1856, ont déterminé les Puissances signataires à donner leur adhésion à différentes modifications qui ont contribué à altérer, en partie, la lettre des stipulations primitives.

"Il a rappelé notamment le précédent des Conférences, tenues à différentes époques à Paris, et cité les décisions prises d'un commun accord, en vue de modifier le régime des Principautés de Moldavie et de Valachie,—changement qui a obtenu la sanction de la Sublime Porte, ainsi que l'assentiment des autres Parties Contractantes.

"Il a constaté que ces déviations du Traité n'ont exercé aucune influence sur la ferme intention de l'Empereur de maintenir intacts les principes généraux du Traité de 1856, qui ont fixé la position de la Turquie dans le concert Européen.

"Après avoir exposé à cet égard les vues de son auguste Maître, le Plénipotentiaire de Russie a signalé combien la situation actuelle en Europe est loin de celle qui existait à l'époque du Congrès de Paris.

"Aujourd'hui, prenant en sérieuse considération les changements produits graduellement par la marche du temps, le Plénipotentiaire de Russie a cru devoir en conclure qu'il serait d'une politique prévoyante et sage de soumettre les stipulations de 1856, relatives à la navigation de la Mer Noire, à une révision à laquelle présiderait un sentiment unanime d'équité et de concorde.

"De fait, ces stipulations, suggérées à une autre époque sous

l'influence de conjonctures toutes différentes de la situation présente, ne se trouvent plus en accord avec les rapports de bon voisinage qui existent actuellement entre les deux Puissances Riveraines.

" De plus, le Plénipotentiaire de Russie, conformément aux instructions dont il est muni, a déclaré que son auguste Maître attache une juste importance à cette révision dans le double intérêt de la sécurité et de la dignité de son Empire.

" En s'acquittant à cet égard des ordres de sa Cour, il a exprimé l'espoir que les nouveaux arrangements résultants de cette révision contribueront à l'affermissement de la paix, qui forme l'objet de la sollicitude commune de toutes les grandes Puissances dont les Représentants se trouvent réunis en Conférence à Londres."

M. le Plénipotentiaire de Turquie dit qu'il apprécie l'esprit de conciliation qui a dicté l'exposé de M. le Plénipotentiaire de Russie, et qu'animé du même esprit conciliant il s'abstiendra de discuter certains points de cet exposé sur lesquels il diffère d'avis, et réserve l'opinion de son Gouvernement.

Il fait observer cependant que la Sublime Porte envisage l'incident soumis à la considération de la Conférence à un point de vue plus élevé; qu'en effet Sa Majesté Impériale le Sultan désire entretenir avec Sa Majesté l'Empereur de Russie les meilleurs rapports d'amitié et de bon voisinage ; et que, surtout, la Sublime Porte tient à donner dans cette circonstance une preuve de ses dispositions conciliantes et de sa sollicitude pour la cause de la paix, en participant à l'examen d'une question qui concerne également d'autres grandes Puissances, et qui autrement pourrait conduire à des complications qu'il est de l'intérêt général de prévenir.

Il déclare que c'est dans ce désir et dans ces vues que son auguste Maître lui a donné l'ordre de représenter son Gouvernement au sein de la Conférence.

Il conclut en priant M. le Président de vouloir bien, avec le consentement des autres Membres de la Conférence, remettre à quelques jours la prochaine séance, pour qu'il ait le tems de bien considérer la proposition de M. le Plénipotentiaire de Russie.

M. le Plénipotentiaire de l'Allemagne du Nord dit qu'il tient à constater, dès l'ouverture de la Conférence, que le Gouvernement du Roi son auguste Maître, en proposant le

premier de réunir en Conférence les Plénipotentiaires des Puissances signataires du Traité de Paris du 30 Mars, 1856, l'a fait dans un esprit de conciliation, d'équité, et de paix, et que c'est dans ce même esprit que sa Cour l'a chargé d'appuyer et de recommander à la sérieuse considération de MM. les Plénipotentiaires des autres Puissances représentées dans la Conférence, le désir du Gouvernement Impérial de Russie de voir les stipulations de 1856, relatives à la navigation de la Mer Noire, soumises à une révision qui ferait disparaître certaines clauses dont le caractère restrictif, quant à l'exercice des droits de souveraineté des deux Puissances Riveraines semble plutôt de nature à entretenir un état de malaise entre elles qu'à raffermir de plus en plus, comme il est essentiellement désirable pour le maintien de la tranquillité de l'Orient, les rapports de bon voisinage qui se sont heureusement établis entre les deux Puissances, et que MM. les Plénipotentiaires de la Russie et de la Turquie viennent de constater tous les deux.

Le Gouvernement de Sa Majesté s'est laissé guider en cette circonstance par le désir d'amener sur les questions qui se rattachent à la navigation de la Mer Noire une entente générale entre les Grandes Puissances de l'Europe, qui ne pourra que puissamment contribuer à la sécurité de l'Orient et au maintien de l'indépendance et de l'intégrité de l'Empire Ottoman, que toutes les Puissances signataires du Traité de 30 Mars, 1856, désirent assurer. Les instructions qui lui ont été données, en conséquence, lui prescrivent d'entrer avec une entière impartialité et une parfaite liberté d'appréciation dans la discussion des propositions qui pourront être soumises de part et d'autre à la Conférence, et de les envisager uniquement du point de vue de l'entente Européenne et de la conservation actuelle et future de la paix en Orient.

Se référant à la proposition d'ajournement émise par M. le Plénipotentiaire de Turquie, M. le Comte Granville dit qu'il s'y associe d'autant plus volontiers que la Conférence ne s'étant occupée aujourd'hui que de la question de droit, cet ajournement donnera, il l'espère, l'occasion à M. le Plénipotentiaire de France de venir prendre part à la discussion des stipulations du Traité de 1856 se rapportant à la neutralisation de la Mer Noire, qui doit être entamée dans la prochaine séance.

Il rend justice aux sentiments qui ont inspiré à la Prusse l'idée de la Conférence. Cependant, pour préciser les faits, il tient à rappeler que la première idée a été de la tenir à St. Pétersbourg, et qu'elle n'a été acceptée qu'à la condition de changer le lieu de la réunion, et d'y entrer sans parti pris et avec une parfaite liberté de discussion.

Il se félicite de l'esprit d'équité et de conciliation dont la discussion d'aujourd'hui a été empreinte. Il en tire un bon augure pour le résultat de l'examen que la Conférence va faire de quelques-unes des stipulations du Traité de 1856, en vue de leur révision.

Après avoir pris l'engagement d'observer le secret sur tout ce qui se passera dans la Conférence, MM. les Plénipotentiaires se séparent, en convenant que leur prochaine réunion aura lieu le Mardi, 24 Janvier, à 1 heure.

(Signé)

BERNSTORFF.	CADORNA.
APPONYI.	BRUNNOW.
GRANVILLE.	MUSURUS.

ANNEXE.

LES Plénipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande Bretagne, de l'Italie, de la Russie, et de la Turquie, réunis aujourd'hui en Conférence, reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale.

En foi de quoi les dits Plénipotentiaires ont signé le présent Protocole.

Fait à Londres, ce 17 Janvier, 1871.

(Signé)

BERNSTORFF.	BRUNNOW.
APPONYI.	MUSURUS.
GRANVILLE.	BROGLIE.
CADORNA.	

13 Mars, 1871.

(Translation.)

Protocol No. 1.—Sitting of January 17, 1871.

PRESENT:—For North Germany—Count Bernstorff, &c.; for Austria-Hungary—Count Apponyi, &c.; for Great Britain—Earl Granville, &c.; for Italy—the Chevalier Ch. Cadorna, &c.; for Russia—Baron Brunnow, &c.; for Turkey—Musurus Pasha, &c.

THE Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, met to-day in Conference at the Foreign Office.

The sitting is opened by his Excellency Musurus Pasha, who proposes that the Presidency of the Conference should be entrusted to Earl Granville in the following terms:—

"Gentlemen,—Being met in Conference for the examination of a question of high importance, our first duty is to proceed to the choice of our President. As you have been so good as to permit me to speak on this occasion, I have the honour to propose to you to entrust the Presidency of this Assembly to his Excellency Earl Granville, Principal Secretary of State of Her Majesty the Queen for Foreign Affairs.

"Not only is this an act of respect due to the august Sovereign under whose auspices we are called upon to fulfil an important mission, but it is at the same time an expression of the confidence which is inspired in our Governments and in all of us by the eminent qualities which render the noble Lord so well fitted to give the best direction to the labours of the Conference, and by the enlightened solicitude with which he has applied himself since the commencement of the incident which is to occupy our attention, to preparing the way for a solution in conformity with international law and with the general desire for the preservation of peace."

This proposal having been unanimously adopted, Earl Granville assumes the Presidency, and expresses himself as follows:—

"I hasten to thank the Turkish Ambassador for the kind manner in which he has brought forward the proposal which you, Gentlemen, have been so good as to agree to.

"I propose to you, Gentlemen, to entrust to Mr. Stuart the drawing up of the Protocols of the Conference."

This proposal having also been agreed to, Mr. Stuart is introduced, and the Plenipotentiaries proceed to the verification of their respective powers, which are found in good and due form.

Earl Granville then resumes :—

"I am deeply sensible," he says, "of the honour which you have done me in calling on me to be President of this Conference.

"At the moment of commencing the discussion of a great European question in which France is deeply interested, and for which she has formerly made great sacrifices, I cannot but express my great regret, which I am sure, Gentlemen, is shared by you, at not seeing her represented among us to-day.

"But M. Jules Favre, designated as Plenipotentiary of France, not being able to be present at our meeting to-day, it only remains to me to propose to you that we should record by general agreement our hope that the French Plenipotentiary will eventually adhere to any decision to be taken in this sitting, and that I should be permitted to communicate confidentially to the Chargé d'Affaires of France the details of our labours to-day."

The Plenipotentiaries having declared their complete assent on these points, Earl Granville continues :—

"The Conference has been accepted by all the co-signatary Powers of the Treaty of 1856, for the purpose of examining without any foregone conclusion and of discussing with perfect freedom the proposals which Russia desires to make to us with regard to the revision which she asks of the stipulations of the said Treaty relative to the neutralization of the Black Sea.

"This unanimity furnishes a striking proof that the Powers recognize that it is an essential principle of the law of nations that none of them can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof unless with the consent of the Contracting Parties by means of an amicable understanding.

"This important principle appears to me to meet with general acceptance, and I have the honour to propose to you, Gentlemen, to sign a Protocol *ad hoc*."

The Protocol in question is then submitted to the Con-

ference and signed by all the Plenipotentiaries, who further decide that it shall be annexed to the general Protocol of the present sitting, and that, on his arrival, the Plenipotentiary of France shall be requested to add his signature to it.

After expressing how much he shares in the regret of the President at not seeing France represented at the meeting of to-day, the Plenipotentiary of Turkey declares that he has agreed in the name of his government to the principle laid down by the President with so much the more readiness, inasmuch as the Sublime Porte has, on all occasions, recognized its binding character, and has constantly conformed its policy thereto in its relations with foreign nations.

The Plenipotentiary of Austria-Hungary says that the Imperial and Royal Government has not hesitated to accept the meeting of this Conference, which has been called to give a fresh pledge for the faith of Treaties and for the principles as well as the interests which they are designed to secure.

He adds that it is in a spirit of conciliation and of equitable appreciation that the Government of His Imperial and Royal Apostolic Majesty has charged him to enter into the examination of the questions with which the Conference is to be occupied. These sentiments are the more in conformity with the intentions of the Austro-Hungarian Government as it sees in them the means of once more placing on record, by means of an impartial examination, the agreement of the Powers on the important questions which form the object of the Treaty signed at Paris on the 30th of March, 1856.

The Plenipotentiary of Italy is rejoiced at the agreement of the Powers resulting from the Protocol which has just been signed, and at the declarations of the Plenipotentiaries, in which he hastens to join. Italy will be happy to lend her hearty assistance to the important work of general interest for which the Conference has met, and to enter upon it in the fullest spirit of equity and conciliation.

On the invitation of the President the Plenipotentiary of Russia speaks. He requests the permission of the Conference to read a summary which he wishes to be inserted in the Protocol :—

"The Plenipotentiary of Russia recapitulated the circumstances and facts which, since the signature of the Treaty

concluded at Paris on the 30th March, 1856, have induced the Powers who signed it to give their assent to different modifications which have contributed to alter in part the letter of the original stipulations.

"He instanced specially the precedent of the Conferences held at different periods at Paris, and cited the decisions adopted by general agreement with the view of modifying the government of the Principalities of Moldavia and Wallachia—an alteration which received the sanction of the Sublime Porte, as well as the assent of the other Contracting Powers.

"He affirmed that these deviations from the Treaty have exercised no influence on the firm intention of the Emperor to maintain intact the general principles of the Treaty of 1856, which have defined the position of Turkey in the system of Europe.

"After having explained the views of his august Master on this subject, the Plenipotentiary of Russia pointed out how much the present situation of Europe differs from that which existed at the time of the Congress of Paris.

"At the present moment, taking into serious consideration the changes gradually produced by the course of time, the Plenipotentiary of Russia thinks the conclusion must be drawn that it would be an act of prudent and wise policy to submit the stipulations of 1856, relative to the navigation of the Black Sea, to a revision guided by an unanimous sentiment of equity and concord.

"In fact, these stipulations, suggested at another period under the influence of conjunctures entirely different from the present situation, are no longer in harmony with the relations of good neighbourhood which exist at this moment between the two Riverain Powers.

"Further, the Plenipotentiary of Russia, in conformity with the instructions with which he is provided, declared that his august Master attaches a just importance to this revision in the double interest of the security and of the dignity of his Empire.

"In acquitting himself of the orders of his Court on this point, he expressed the hope that the new arrangements resulting from this revision will contribute to the confirmation of peace, which forms the subject of general solicitude on the

part of all the great Powers whose representatives are assembled in Conference in London."

The Plenipotentiary of Turkey says that he appreciates the spirit of conciliation which has dictated the statement of the Plenipotentiary of Russia, and that animated by the same conciliatory spirit he will abstain from discussing certain points of that statement on which he differs, and reserves the opinion of his Government.

He observes, however, that the Sublime Porte regards the incident submitted to the consideration of the Conference from a higher point of view; that, in fact, His Imperial Majesty the Sultan desires to maintain with His Majesty the Emperor of Russia the best relations of friendship and good neighbourhood; and that, above all, the Sublime Porte is anxious to give, in the present circumstances, a proof of its conciliatory disposition and of its solicitude for the cause of peace, by joining in the examination of a question which equally concerns other great Powers, and which might otherwise lead to complications which it is in the general interest to prevent.

He declares that it is with this desire and with these views that his august Master has commanded him to represent his Government in the Conference.

He concludes by begging the President to be so good as to postpone the next sitting for some days, with the consent of the other members of the Conference, in order that he may have time to consider the proposal of the Plenipotentiary of Russia.

The Plenipotentiary of North Germany says that he is anxious to place on record, at the opening of the Conference, that the Government of the King his august Master, in being the first to propose a meeting in Conference of the Plenipotentiaries of the Powers who signed the Treaty of Paris of March 30, 1856, has done so in a spirit of conciliation, of equity, and of peace, and that it is in this same spirit that his Court has instructed him to support and to recommend to the serious consideration of the Plenipotentiaries of the other Powers represented in the Conference the desire of the Imperial Government of Russia to see the stipulations of 1856, relative to the navigation of the Black Sea, submitted to a revision which should eliminate certain clauses, the restrictive cha-

racter of which, as regards the exercise of the rights of sovereignty of the two Riverain Powers, seems rather calculated to maintain a state of uneasiness between them than to confirm more and more, as is essentially desirable for the maintenance of tranquillity in the East, the relations of good neighbourhood which are happily established between the two Powers, and of which the Plenipotentiaries of Russia and Turkey have both of them just given evidence.

His Majesty's Government has been guided in this incident by the desire of bringing about, on the questions connected with the navigation of the Black Sea, a general understanding between the great Powers of Europe, which cannot but contribute powerfully to the security of the East and to the maintenance of the independence and integrity of the Ottoman Empire, which all the Powers who signed the Treaty of Paris of March 30, 1856, desire to secure. The instructions which have been given him consequently desire him to enter with entire impartiality and perfect freedom of judgment on the discussion of the proposals which may be submitted on either side to the Conference, and to regard them solely with a view to the harmony of Europe, and to the present and future preservation of peace in the East.

Referring to the proposal of adjournment made by the Plenipotentiary of Turkey, Earl Granville says that he joins in it the more willingly as the Conference having only been occupied to-day with the question of principle, this adjournment will, he hopes, afford an opportunity for the Plenipotentiary of France to arrive and take part in the discussion of the stipulations of the Treaty of 1856, relating to the neutralization of the Black Sea, which is to take place in the next sitting.

He renders justice to the sentiments which suggested to Prussia the idea of the Conference. Still, with a view to a clear definition of the facts he thinks it right to remark that the first idea was to hold it at St. Petersburgh, and that it was only accepted on condition that the place of meeting should be changed, and that it should be entered upon without foregone conclusion, and with perfect freedom of discussion.

He congratulates himself on the principle of equity and conciliation with which the discussion of to-day has been

pervaded. He draws from it a good omen for the result of the examination which the Conference is to make of some of the stipulations of the Treaty of 1856, with a view to their revision.

After having engaged to observe secrecy on all that may pass in the Conference, the Plenipotentiaries separate, agreeing that their next meeting shall take place on Tuesday, January 24, at 1 o'clock.

(Signed)

BERNSTORFF.	CADORNA.
APPONYI.	BRUNNOW.
GRANVILLE.	MUSURUS.

ANNEX.

THE Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, assembled to-day in Conference, recognize that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.

In faith of which the said Plenipotentiaries have signed the present Protocol.

Done at London, the 17th January, 1871.

(Signed)

BERNSTORFF.	BRUNNOW.
APPONYI.	MUSURUS.
GRANVILLE.	BROGLIE.
CADORNA.	

March 13, 1871.

Protocole No. 5.—Séance du 13 Mars, 1871.

PRÉSENTS:—M. le Plénipotentiaire d'Allemagne, d'Autriche-Hongrie, de France, de la Grande Bretagne, d'Italie, de Russie, de Turquie.

A L'OUVERTURE de la séance M. le Président présente M. le

Duc de Broglie à la Conférence comme Plénipotentiaire de France, en disant :—

"Je crois être le fidèle interprète de MM. les Plénipotentiaires en exprimant à M. le Duc de Broglie la vive satisfaction avec laquelle nous accueillons ici aujourd'hui le Représentant de la France.

"J'ai l'espoir que M. le Duc aura eu l'occasion de se convaincre par les ajournements successifs de nos séances, par les Protocoles que nous avons signés, et par les informations que MM. les Plénipotentiaires m'ont permis de donner presque journellement à M. le Chargé d'Affaires de France, que nous avons fait notre possible pour nous assurer l'indispensable concours de la France."

M. le Plénipotentiaire de France, après avoir présenté ses pleins pouvoirs, trouvés en bonne et due forme, répond à M. le Comte Granville dans les termes suivants :—

"Je remercie sincèrement, au nom du Gouvernement Français, M. le président de la Conférence des paroles pleines d'amitié et de bienveillance pour la France qu'il vient de prononcer ; j'offre les mêmes remerciements à MM. les Plénipotentiaires qui veulent bien y donner leur assentiment. Je devrais en même temps leur présenter mes excuses pour le retard que j'ai mis à prendre séance au milieu d'eux et l'abus que j'ai fait de leur patience ; mais le monde entier connaît les causes douloureuses qui ont retenu le Représentant de la France.

"Bien que régulièrement informé par vos communications bienveillantes du cours de vos délibérations, le Gouvernement Français n'a pu y prendre part, et elles sont aujourd'hui arrivées presqu'à leur terme. Le principal objet qui a motivé la réunion de cette Conférence a été réglé d'un commun accord entre les Plénipotentiaires présents. Le Gouvernement Français aurait peut-être préféré s'abstenir jusqu'au bout de s'associer à des décisions à la discussion desquelles il est resté étranger.

"Mais il aurait craint, en prolongeant son abstention maintenant que la triste cause en a disparu, de ne pas témoigner assez hautement le prix qu'il attache à tout ce qui peut entretenir ou rétablir l'harmonie entre les Grands Etats. Il saisit aussi avec empressement l'occasion de maintenir la règle salutaire de la société Européenne,—à savoir, de à n'apporter aucun changement essentiel aux relations des peuples entr'eux,

sans l'examen et le consentement de toutes les Grandes Puissances,—pratique tutélaire, véritable garantie de paix et de civilisation, à laquelle trop de dérogations ont été apportées dans ces dernières années.

"En ce qui touche l'objet principal de la Conférence, le Gouvernement Français, partageant les sentiments exprimés par M. le Plénipotentiaire de Turquie, n'aurait aperçu personnellement aucune raison suffisante pour modifier les stipulations établies par le Traité de 1856, et aurait préféré leur maintien. Mais au point où les choses sont parvenues, et du moment où l'arrangement nouveau, agréable au Gouvernement Russe, est agréé par celui de la Sublime Porte, principal intéressé dans la question, le Gouvernement Français entre volontiers dans la pensée de conciliation qui l'a dicté, et il apporte son adhésion à toutes les décisions de la Conférence."

M. le Plénipotentiaire de Russie s'empresse d'offrir à M. l'Ambassadeur de France l'expression de ses sincères remerciements des bonnes dispositions qu'il a bien voulu énoncer à l'égard de la Russie; il se fera un devoir d'en rendre compte à sa Cour, et il ajoute que l'esprit de conciliation qui a présidé aux déterminations du Gouvernement Français, en ce qui regarde la question soumise aux délibérations de la Conférence, sera vivement apprécié par le Cabinet de St. Pétersbourg.

Sur l'invitation de M. le Président, M. le Plénipotentiaire de France appose sa signature au Protocole annexé à celui de la séance du 17 Janvier.

(Translation.)

Protocol No. 5.—Sitting of March 13, 1871.

PRESENT:—The Plenipotentiary of Germany, of Austria-Hungary, of France, of Great Britain, of Italy, of Russia, of Turkey,

AT the commencement of the sitting the President presents the Duc de Broglie to the Conference as Plenipotentiary of France, saying:—

"I believe that I represent correctly the feelings of the Plenipotentiaries in expressing to the Duc de Broglie the warm satisfaction with which we welcome here to-day the Representative of France.

"I hope that the Duke will have been able to convince himself from the successive adjournments of our sittings, from the Protocols we have signed, and from the communications which the Plenipotentiaries have allowed me to make almost daily to the Chargé d'Affaires of France, that we have done all in our power to secure the indispensable concurrence of France."

The Plenipotentiary of France, after having presented his full powers, which are found to be in good and due form, replies to Earl Granville in the following terms:—

"I thank the President of the Conference sincerely in the name of the French Government for the expressions of friendship and goodwill towards France which he has just made use of; I offer the same thanks to the Plenipotentiaries who are so good as to join in those expressions. I ought, at the same time, to apologize to them for having delayed so long to take my seat among them, and for having so far abused their patience; but the whole world knows the painful causes which detained the Representative of France.

"Although regularly informed by your kind communications of the progress of your deliberations, the French Government has not been able to take part in them, and they are now almost come to a conclusion. The principal object which led to the assembly of this Conference has been settled by general agreement between the Representatives present. The French Government would, perhaps, have preferred to abstain to the last from joining in decisions in the discussion of which it has taken no part.

"But it would have feared that, by continuing its abstention now that the sad cause of it has disappeared, it might have failed to give sufficient evidence of the value which it attaches to all that can maintain or re-establish harmony between the Great Powers. It therefore avails itself eagerly of the opportunity to maintain the salutary rule of the European family of nations,—namely, that no essential change should be introduced into the relations of nations towards one another without the examination and consent of all the Great Powers,—a practice which protects and affords a true guarantee for peace and civilization, and which has been too often disregarded in these last years.

"As regards the principal object of the Conference the

French Government, sharing the feelings expressed by the Plenipotentiary of Turkey, would not personally have seen any sufficient reason to modify the stipulations established by the Treaty of 1856, and would have preferred their maintenance. But, at the stage at which affairs have arrived, and from the moment that the new arrangement, agreeable to the Russian Government, is agreed to by that of the Sublime Porte, the Party principally interested in the question, the French Government willingly enters into the feeling of conciliation which has dictated it, and gives its assent to all the decisions of the Conference."

The Plenipotentiary of Russia hastens to offer to the Ambassador of France the expression of his sincere thanks for the friendly feelings which he has been so good as to express with regard to Russia; he will make it his duty to report them to his Court, and he adds that the spirit of conciliation which has guided the decisions of the French Government as regards the question submitted to the deliberations of the Conference will be warmly appreciated by the Cabinet of St. Petersburgh.

On the invitation of the President, the Plenipotentiary of France attaches his signature to the Protocol annexed to that of the sitting of January 17.

TREATY between Her Majesty, the Emperor of Germany, King of Prussia, the Emperor of Austria, the French Republic, the King of Italy, the Emperor of Russia, and the Sultan, for the Revision of certain Stipulations of the Treaty of March 30, 1856.

Signed at London, March 13, 1871.

[Ratifications exchanged at London, May 15, 1871.]

AU NOM DE DIEU TOUT-PUISSANT.

SA Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, Sa Majesté l'Empereur d'Allemagne, Roi de Prusse, Sa Majesté l'Empereur d'Autriche, Roi de Bohême, &c., et Roi Apostolique de Hongrie, le Chef du Pouvoir Exécutif de la République Française, Sa Majesté le Roi

d'Italie, Sa Majesté l'Empereur de toutes les Russies, et Sa Majesté l'Empereur des Ottomans, ont jugé nécessaire de réunir leurs Représentants en Conférence à Londres, afin de s'entendre, dans un esprit de concorde, sur la révision des stipulations du Traité conclu à Paris le 30 Mars, 1856, relatives à la navigation de la Mer Noire, ainsi quià celle du Danube; désirant en même temps assurer dans ses contrées de nouvelles facilités au développement de l'activité commerciale de toutes les nations, les Hautes Parties Contractantes ont résolu de conclure un Traité, et ont nommé à cet effet pour leurs Plénipotentiaires, savoir:—

Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, le Très Honorable Granville George, Comte Granville, Lord Leveson, Pair du Royaume Uni, Chevalier du Très Noble Ordre de la Jarretière, Conseiller de Sa Majesté en Son Conseil Privé, Lord Gardien des Cinque Ports et Connétable du Chateau de Douvres, Chancelier de l'Université de Londres, Principal Secrétaire d'Etat de Sa Majesté pour les Affaires Etrangères, &c.;

Sa Majesté l'Empereur d'Allemagne, Roi de Prusse, le Sieur Albert, Comte de Bernstorff-Stintenburg, Son Ministre d'Etat et Chambellan, Grand Commandeur de Son Ordre de la Maison Impériale et Royale de Hohenzollern en diamants, et Grand-Croix de Son Ordre de l'Aigle Rouge avec des feuilles de chêne, Grand-Croix de l'Ordre Ducal de la Branche Ernestine de la Maison de Saxe, Chevalier de l'Ordre Impérial de St. Stanislas de Russie de première classe, et de l'Ordre Royal du Lion d'Or de la Maison de Nassau, Grand-Croix de l'Ordre Royal du Mérite Civil de la Couronne de Bavière, de l'Ordre de la Légion d'Honneur de France, de l'Ordre Impérial du Lion et du Soleil de Perse, de l'Ordre Royal et Militaire du Christ de Portugal, &c., Ambassadeur Extraordinaire et Plénipotentiaire de Sa Majesté Impériale et Royale près Sa Majesté Britannique, &c.;

Sa Majesté l'Empereur d'Autriche, Roi de Bohême, &c., et Roi Apostolique de Hongrie, le Sieur Rodolphe, Comte Apponyi, Chambellan, Conseiller Intime de Sa Majesté Impériale et Royale Apostolique, Chevalier de l'Ordre de la Toison d'Or, Grand-Croix de l'Ordre Impérial de Léopold, Son Ambassadeur Extraordinaire près Sa Majesté Britannique, &c.;

Le Chef du Pouvoir Exécutif de la République Française, le Sieur Jacques Victor Albert, Duc de Broglie, Chevalier de l'Ordre de la Légion d'Honneur, Ambassadeur Extraordinaire et Plénipotentiaire de la République près Sa Majesté Britannique, &c.;

Sa Majesté le Roi d'Italie, le Chevalier Charles Cadorna, Ministre d'Etat, Sénateur du Royaume, Chevalier Grand-Croix décoré du Grand Cordon de Ses Ordres de St. Maurice et de St. Lazare et de la Couronne d'Italie, Son Envoyé Extraordinaire et Ministre Plénipotentiaire près Sa Majesté Britannique, &c.;

Sa Majesté l'Empereur de toutes les Russies, le Sieur Philippe, Baron de Brunnow, Son Conseiller Privé Actuel, Chevalier des Ordres de Russie, de l'Aigle Rouge de Prusse de la première classe, Commandeur de St. Etienne de Hongrie, Grand-Croix de l'Ordre de la Légion d'Honneur de France, de l'Ordre du Mérite de Turquie, Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique, &c.;

Et Sa Majesté l'Empereur des Ottomans, Constantin Musurus Pacha, Muchir et Vizir de l'Empire, décoré des Ordres Impériaux de l'Osmanié et du Medjidié de première Classe, Grand-Croix de l'Ordre des Saints Maurice et Lazare, et de plusieurs autres Ordres Etrangers, Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique, &c.;

Lesquels, après avoir échangé leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des Articles suivants:—

ARTICLE I.

Les Articles XI, XIII, et XIV du Traité de Paris du 30 Mars, 1856, ainsi que la Convention spéciale conclue entre la Sublime Porte et la Russie, et annexée au dit Article XIV, sont abrogés et remplacés par l'Article suivant.

ARTICLE II.

Le principe de la clôture des Détroits des Dardanelles et du Bosphore, tel qu'il a été établi par la Convention séparée du 30 Mars, 1856, est maintenu, avec la faculté pour Sa Majesté Impériale le Sultan d'ouvrir les dits Détroits en temps de paix aux bâtiments de guerre des Puissances amies et alliées, dans le cas où la Sublime Porte le jugerait nécessaire pour sauve-

garder l'exécution des stipulations du Traité de Paris du 30 Mars, 1856.

ARTICLE III.

La Mer Noire reste ouverte, comme par le passé, à la marine marchande de toutes les nations.

ARTICLE IV.

La Commission établie par l'Article XVI du Traité de Paris, dans laquelle les Puissances co-signataires du Traité sont chacune représentées par un Délegué, et qui a été chargée de désigner et de faire exécuter les travaux nécessaires depuis Isaktcha, pour dégager les embouchures du Danube, ainsi que les parties de la Mer Noire y avoisinantes, des sables et autres obstacles qui les obstruent, afin de mettre cette partie du fleuve et les dites parties de la Mer dans les meilleures conditions de navigabilité, est maintenue dans sa composition actuelle. La durée de cette Commission est fixée pour une période ultérieure de douze ans, à compter du 24 Avril, 1871, c'est à dire jusqu'au 24 Avril, 1883, terme de l'amortissement de l'emprunt contracté par cette Commission sous la garantie de la Grande Bretagne, de l'Allemagne, de l'Autriche-Hongrie, de la France, de l'Italie, et de la Turquie.

ARTICLE V.

Les conditions de la réunion nouvelle de la Commission Riveraine, établie par l'Article XVII du Traité de Paris du 30 Mars, 1856, seront fixées par une entente préalable entre les Puissances Riveraines, sans préjudice de la clause relative aux trois Principautés Danubiennes ; et en tant qu'il s'agirait d'une modification de l'Article XVII du dit Traité, cette dernière fera l'objet d'une Convention spéciale entre les Puissances co-signataires.

ARTICLE VI.

Les Puissances Riveraines de la partie du Danube où les Cataractes et les Portes de Fer mettent des obstacles à la navigation, se réservant de s'entendre entr'elles à l'effet de faire disparaître ces obstacles, les Hautes Parties Contractantes leur reconnaissent dès-à-présent le droit de percevoir un taxe provisoire sur les navires de commerce sous tout pavillon qui

en profiteront désormais, jusqu'à l'extinction de la dette contractée pour l'exécution des travaux; et elles déclarent l'Article XV du Traité de Paris de 1856 inapplicable à cette partie du fleuve pour un laps de temps nécessaire au remboursement de la dette en question.

ARTICLE VII.

Tous les ouvrages et établissement de toute nature créés par la Commission Européenne en exécution du Traité de Paris de 1856, ou du présent Traité, continueront à jouir de la même neutralité qui les a protégés jusqu'ici, et qui sera également respectée à l'avenir dans toutes les circonstances par les Hautes Parties Contractantes. Le bénéfice des immunités qui en dérivent s'étendra à tout le personnel administratif et technique de la Commission. Il est, cependant, bien entendu que les dispositions de cet Article n'affecteront en rien le droit de la Sublime Porte de faire entrer, comme de tout temps, ses bâtiments de guerre dans le Danube en sa qualité de Puissance territoriale.

ARTICLE VIII.

Les Hautes Parties Contractantes renouvellent et confirment toutes les Stipulations du Traité du 30 Mars, 1856, ainsi que de ses annexes, qui ne sont pas annulées ou modifiées par le présent Traité.

ARTICLE IX.

Le présent Traité sera ratifié, et les ratifications en seront échangées à Londres dans l'espace de six semaines[1], ou plus tôt si faire se peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signé et y ont apposé le sceau de leurs armes.

Fait à Londres, le treizième jour du mois de Mars de l'an mil huit cent soixante-onze.

(L.S.) GRANVILLE.
(L.S.) BERNSTORFF.
(L.S.) APPONYI.
(L.S.) BROGLIE.
(L.S.) CADORNA.
(L.S.) BRUNNOW.
(L.S.) MUSURUS.

[1] This period was afterwards extended to the 15th of May.

(Translation.)

IN THE NAME OF ALMIGHTY GOD.

HER Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Germany, King of Prussia, His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary, The Chief of the Executive Power of the French Republic, His Majesty the King of Italy, His Majesty the Emperor of all the Russias, and His Majesty the Emperor of the Ottomans, have judged it necessary to assemble their Representatives in Conference at London, in order to come to an understanding, in a spirit of concord, with regard to the revision of the stipulations of the Treaty concluded at Paris on the 30th March, 1856, relative to the navigation of the Black Sea, as well as to that of the Danube; being desirous, at the same time, to ensure in those regions new facilities for the development of the commercial activity of all nations, the High Contracting Parties have resolved to conclude a Treaty, and have for that purpose named as their Plenipotentiaries, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Granville George Earl Granville, Lord Leveson, a Peer of the United Kingdom, Knight of the Most Noble Order of the Garter, a Member of Her Majesty's Privy Council, Lord Warden of the Cinque Ports and Constable of Dover Castle, Chancellor of the University of London, Her Majesty's Principal Secretary of State for Foreign Affairs;

His Majesty the Emperor of Germany, King of Prussia, the Sieur Albert, Count Bernstorff-Stintenburg, His Minister of State and Chamberlain, Grand Commander of His Order of the Imperial and Royal House of Hohenzollern in Diamonds, and Grand Cross of His Order of the Red Eagle with Oak Leaves, Grand Cross of the Ducal Order of the Ernestine Branch of the House of Saxony, Knight of the Imperial Order of St. Stanislaus of Russia of the First Class, and of the Royal Order of the Golden Lion of the House of Nassau, Grand Cross of the Royal Order of Civil Merit of the Crown of Bavaria, of the Order of the Legion of Honour of France, of the Imperial Order of the Lion and Sun of

Persia, of the Royal and Military Order of Christ of Portugal, &c., Ambassador Extraordinary and Plenipotentiary of His Imperial and Royal Majesty to Her Britannic Majesty, &c.;

His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary, the Sieur Rudolph Count Apponyi, Chamberlain, Privy Councillor of His Imperial and Royal Apostolic Majesty, Knight of the Order of the Golden Fleece, Grand Cross of the Imperial Order of Leopold, His Ambassador Extraordinary to Her Britannic Majesty, &c.;

The Chief of the Executive Power of the French Republic, the Sieur James Victor Albert Duc de Broglie, Knight of the Order of the Legion of Honour, Ambassador Extraordinary and Plenipotentiary of the Republic to Her Britannic Majesty, &c.;

His Majesty the King of Italy, the Chevalier Charles Cadorna, Minister of State, Senator of the Kingdom, Knight Grand Cross decorated with the Grand Cordon of His Orders of St. Maurice and St. Lazarus and of the Crown of Italy, His Envoy Extraordinary and Minister Plenipotentiary to Her Britannic Majesty, &c.;

His Majesty the Emperor of all the Russias, the Sieur Philip Baron Brunnow, His Actual Privy Councillor, Knight of the Orders of Russia, of the Red Eagle of Prussia of the First Class, Commander of St. Stephen of Hungary, Grand Cross of the Order of the Legion of Honour of France, of the Order of Merit of Turkey, His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty, &c.;

And His Majesty the Emperor of the Ottomans, Constantine Musurus Pasha, Muchir and Vizir of the Empire, decorated with the Imperial Orders of the Osmanié and of the Medjidié of the First Class, Grand Cross of the Order of St. Maurice and St. Lazarus, and of several other Foreign Orders, His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty, &c.;

Who, after having exchanged their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

Articles XI, XIII, and XIV of the Treaty of Paris of

March 30, 1856, as well as the special Convention concluded between Russia and the Sublime Porte, and annexed to the said Article XIV, are abrogated, and replaced by the following Article.

ARTICLE II.

The principle of the closing of the Straits of the Dardanelles and the Bosphorus, such as it has been established by the separate Convention of March 30, 1856, is maintained, with power to His Imperial Majesty the Sultan to open the said Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris of March 30, 1856.

ARTICLE III.

The Black Sea remains open, as heretofore, to the mercantile marine of all nations.

ARTICLE IV.

The Commission established by Article XVI of the Treaty of Paris, in which the Powers who joined in signing the Treaty are each represented by a delegate, and which was charged with the designation and execution of the works necessary below Isaktcha, to clear the mouths of the Danube, as well as the neighbouring parts of the Black Sea, from the sands and other impediments which obstruct them, in order to put that part of the river and the said parts of the sea in the best state for navigation, is maintained in its present composition. The duration of that Commission is fixed for a further period of twelve years, counting from April 24, 1871, that is to say, till April 24, 1883, being the term of the redemption of the loan contracted by that Commission, under the guarantee of Great Britain, Germany, Austria-Hungary, France, Italy, and Turkey.

ARTICLE V.

The conditions of the re-assembling of the Riverain Commission, established by Article XVII of the Treaty of Paris of March 30, 1856, shall be fixed by a previous understanding between the Riverain Powers, without prejudice to the clause

relative to the three Danubian Principalities; and in so far as any modification of Article XVII of the said Treaty may be involved, this latter shall form the subject of a special Convention between the co-signatary Powers.

ARTICLE VI.

As the Powers which possess the shores of that part of the Danube where the Cataracts and the Iron Gates offer impediments to navigation reserve to themselves to come to an understanding with the view of removing those impediments, the High Contracting Parties recognize from the present moment their right to levy a provisional tax on vessels of commerce of every flag which may henceforth benefit thereby, until the extinction of the debt contracted for the execution of the works; and they declare Article XV of the Treaty of Paris of 1856 to be inapplicable to that part of the river for a space of time necessary for the repayment of the debt in question.

ARTICLE VII.

All the works and establishments of every kind created by the European Commission in execution of the Treaty of Paris of 1856, or of the present Treaty, shall continue to enjoy the same neutrality which has hitherto protected them, and which shall be equally respected for the future, under all circumstances, by the High Contracting Parties. The benefits of the immunities which result therefrom shall extend to the whole administrative and engineering staff of the Commission. It is, however, well understood that the provisions of this Article shall in no way affect the right of the Sublime Porte to send, as heretofore, its vessels of war into the Danube in its character of a Territorial Power.

ARTICLE VIII.

The High Contracting Parties renew and confirm all the stipulations of the Treaty of March 30, 1856, as well as of its annexes, which are not annulled or modified by the present Treaty.

ARTICLE IX.

The present Treaty shall be ratified, and the Ratifications

shall be exchanged at London in the term of six weeks[1], or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the Seal of their Arms.

Done at London, the thirteenth day of the month of March, in the year one thousand eight hundred and seventy-one.

(L.S.)	GRANVILLE.	(L.S.)	CADORNA.
(L.S.)	BERNSTORFF.	(L.S.)	BRUNNOW.
(L.S.)	APPONYI.	(L.S.)	MUSURUS.
(L.S.)	BROGLIE.		

Procès-Verbal d'Echange.

LES Soussignés s'étant réunis afin de procéder à l'échange des ratifications du Traité conclu et signé le 13 Mars, 1871, entre Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, Sa Majesté l'Empereur d'Allemagne, Roi de Prusse, Sa Majesté l'Empereur d'Autriche, Roi de Bohême, &c., et Roi Apostolique de Hongrie, le Chef du Pouvoir Exécutif de la République Française, Sa Majesté le Roi d'Italie, Sa Majesté l'Empereur de toutes les Russies, et Sa Majesté l'Empereur des Ottomans, pour la révision des stipulations du Traité du 30 Mars, 1856, relatives à la navigation de la Mer Noire, ainsi qu'à celle du Danube; et les ratifications respectives ayant été soigneusement collationnées et trouvées en bonne et due forme, l'échange en a eu lieu aujourd'hui dans les formes usitées.

Les Plénipotentiaires de Russie et de la Sublime Porte ont en même temps échangé les Ratifications de la Convention qui a été conclue entre leurs Cours respectives le 13 Mars, pour abroger les stipulations de celle signée à Paris le $\frac{18}{30}$ Mars, 1856, relative au nombre et à la force des bâtiments de guerre des Puissances Riveraines dans la Mer Noire, et ont communiqué cette Convention à la Conférence d'après les termes du Protocole No. 5, du 13 Mars.

[1] This period was afterwards extended to the 15th of May.

En foi de quoi les Soussignés ont signé le présent Procès-Verbal d'Échange, et y ont apposé le cachet de leurs armes.

Fait à Londres, le 15 Mai, 1871.

(Signé)

(L.S.)	GRANVILLE.	(L.S.)	CADORNA.
(L.S.)	BERNSTORFF.	(L.S.)	BRUNNOW.
(L.S.)	A. WOLKENSTEIN.	(L.S.)	MUSURUS.
(L.S.)	BROGLIE.		

(Translation.)

THE Undersigned having met together for the purpose of exchanging the ratifications of the Treaty concluded and signed on the 13th of March, 1871, between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Germany, King of Prussia, His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary, the Chief of the Executive Power of the French Republic, His Majesty the King of Italy, His Majesty the Emperor of all the Russias, and His Majesty the Emperor of the Ottomans, for the revision of the stipulations of the Treaty of the 30th of March, 1856, relative to the navigation of the Black Sea, as well as to that of the Danube; and the respective ratifications having been carefully compared and found in good and due form, the exchange took place this day in the usual form.

The Plenipotentiaries of Russia and of the Sublime Porte, at the same time, exchanged the ratifications of the Convention concluded between their respective Courts on the 13th of March, for abrogating the stipulations of that signed at Paris on the $\frac{18}{30}$th of March, 1856, relative to the number and force of the vessels of war of the Riverain Powers in the Black Sea; and communicated that Convention to the Conference, according to the terms of the Protocol No. 5, of the 13th March.

In witness whereof the Undersigned have signed the present Procès-Verbal of Exchange, and have affixed thereto the seal of their arms.

Done at London, the 15th of May, 1871.

(Signed)

(L.S.)	GRANVILLE.	(L.S.)	CADORNA.
(L.S.)	BERNSTORFF.	(L.S.)	BRUNNOW.
(L.S.)	A. WOLKENSTEIN.	(L.S.)	MUSURUS.
(L.S.)	BROGLIE.		

CONVENTION between Russia and Turkey, signed at London, March 13, 1871.

(Communicated to the Conference, on the exchange of the Ratifications, May 15, 1871.)

AU NOM DE DIEU TOUT-PUISSANT.

Sa Majesté l'Empereur de toutes les Russies et Sa Majesté Impériale le Sultan mutuellement animés du désir de consolider les relations de paix et de bonne intelligence heureusement existant entre leurs Empires, ont résolu de conclure dans ce but une Convention, et ont nommé à cet effet pour leurs Plénipotentiaires, savoir:

Sa Majesté l'Empereur de toutes les Russies, le Sieur Philippe Baron de Brunnow, Son Conseiller Privé Actuel et Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique, Chevalier des Ordres de Russie et décoré de l'Ordre Impérial Ottoman du Nishan Iftihar;

Et Sa Majesté Impériale le Sultan, Constantin Musurus Pacha, Muchir et Vizir de l'Empire, décoré des Ordres Impériaux de l'Osmanié et du Medjidié de première classe, Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique;

Lesquels, après avoir échangé leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des Articles suivants:—

ARTICLE I.

La Convention Spéciale conclue à Paris entre Sa Majesté l'Empereur de toutes les Russies et Sa Majesté Impériale le Sultan, le dix-huit / trente Mars de l'an mil huit cent cinquante-six, relative au nombre et à la force des bâtiments de guerre des

deux Hautes Parties Contractantes dans la Mer Noire, est et demeure abrogée.

ARTICLE II.

La présente Convention sera ratifiée, et les ratifications en seront échangées à Londres dans l'espace de six semaines, ou plus tôt si faire le peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signée et y ont apposé le sceau de leurs armes.

Fait à Londres le $\frac{\text{premier}}{\text{treizième}}$ jour du mois de Mars de l'an mil huit cent soixante-onze.

(L.S.) BRUNNOW. (L.S.) MUSURUS.

Pour copie conforme à l'original.

(Signé)

LE COMTE DE BRUNNOW,
Ambassadeur de Russie.

Londres, le $\frac{3}{15}$ *Mai,* 1871.

(Translation.)

IN THE NAME OF ALMIGHTY GOD.

HIS Majesty the Emperor of all the Russias and His Imperial Majesty the Sultan, being mutually animated with the desire to consolidate the relations of peace and good understanding happily existing between their Empires, have resolved to conclude for this purpose a Convention, and have named to that effect as their Plenipotentiaries, that is to say:

His Majesty the Emperor of all the Russias, the Sieur Philip Baron Brunnow, His Actual Privy Councillor and His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty, Knight of the Orders of Russia, and decorated with the Imperial Ottoman Order of the Nishan Iftihar;

And His Imperial Majesty the Sultan, Constantine Musurus Pasha, Muchir and Vizir of the Empire, decorated with the Imperial Orders of the Osmanié and of the Medjidié of the first class, His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty;

Who, after having exchanged their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Special Convention concluded at Paris between His Majesty the Emperor of all the Russias and His Imperial Majesty the Sultan, on the eighteenth / thirtieth of March, in the year one thousand eight hundred and fifty-six, relative to the number and force of the vessels of war of the two High Contracting Parties in the Black Sea, is and remains abrogated.

ARTICLE II.

The present Convention shall be ratified, and the ratifications shall be exchanged at London in the space of six weeks, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at London, the first / thirteenth day of the month of March, in the year one thousand eight hundred and seventy-one.

(L.S.) BRUNNOW. (L.S.) MUSURUS.

A true copy from the original.

(Signed)

COUNT BRUNNOW,
Ambassador of Russia.

London, May $\frac{3}{15}$, 1871.

CONVENTION between Turkey and Russia, signed at London, March 13, 1871.

(Communicated to the Conference, on the exchange of the Ratifications, May 15, 1871.)

AU NOM DE DIEU TOUT-PUISSANT.

SA Majesté Impériale le Sultan et Sa Majesté l'Empereur de toutes les Russies, mutuellement animés du désir de consolider les relations de paix et de bonne intelligence heureusement existant entre leurs Empires, ont résolu de conclure dans ce but une Convention, et ont nommé à cet effet pour leurs Plénipotentiaires, savoir :

Sa Majesté Impériale le Sultan, Constantin Musurus Pacha, Muchir et Vizir de l'Empire, décoré des Ordres Impériaux de l'Osmanié et du Medjidié de première classe, Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique ;

Et Sa Majesté l'Empereur de toutes les Russies, le Sieur Philippe Baron de Brunnow, Son Conseiller Privé actuel, et Son Ambassadeur Extraordinaire et Plénipotentiaire près Sa Majesté Britannique, Chevalier des Ordres de Russie et décoré de l'Ordre Impérial Ottoman du Nishan Iftihar ;

Lesquels, après avoir échangé leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des Articles suivants :

ARTICLE I.

La Convention Spéciale conclue à Paris le dix-huit trente Mars, de l'an mil huit cent cinquante-six, entre Sa Majesté Impériale le Sultan et Sa Majesté l'Empereur de toutes les Russies, relative au nombre et à la force des bâtiments de guerre des deux Hautes Parties Contractantes dans la Mer Noire, est et demeure abrogée.

ARTICLE II.

La présente Convention sera ratifiée, et les ratifications en seront échangées à Londres dans l'espace de six semaines, ou plus tôt si faire se peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signée et y ont apposé le sceau de leurs armes.

Fait à Londres le treizième jour du mois de l'an mil huit cent soixante-onze.

(L.S.) MUSURUS. (L.S.) BRUNNOW.

Pour copie conforme à l'original.

(Signé)

MUSURUS,

Ambassadeur de Turquie.

Londres, le 15 Mai, 1871.

(Translation.)

IN THE NAME OF ALMIGHTY GOD.

HIS Imperial Majesty the Sultan and His Majesty the Emperor of all the Russias, being mutually animated with

the desire to consolidate the relations of peace and good understanding happily existing between their Empires, have resolved to conclude for this purpose a Convention, and have named to that effect as their Plenipotentiaries, that is to say:

His Imperial Majesty the Sultan, Constantine Musurus Pasha, Muchir and Vizier of the Empire, decorated with the Imperial Orders of the Osmanié and of the Medjidié of the first class, His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty;

And His Majesty the Emperor of all the Russias, the Sieur Philip Baron Brunnow, His Actual Privy Councillor, and His Ambassador Extraordinary and Plenipotentiary to Her Britannic Majesty, Knight of the Orders of Russia, and decorated with the Imperial Ottoman Order of the Nishan Iftihar;

Who, after having exchanged their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Special Convention concluded at Paris on the ~~eighteenth~~ thirtieth of March, in the year one thousand eight hundred and fifty-six, between His Imperial Majesty the Sultan and His Majesty the Emperor of all the Russias, relative to the number and force of the vessels of war of the two High Contracting Parties in the Black Sea, is and remains abrogated.

ARTICLE II.

The present Convention shall be ratified, and the ratifications shall be exchanged at London in the space of six weeks, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at London, the ~~first~~ thirteenth day of the month of March, in the year one thousand eight hundred and seventy-one.

(L.S.) MUSURUS. (L.S.) BRUNNOW.

A true copy from the original.

(Signed)

MUSURUS,
Ambassador of Turkey.

London, May 15, 1871.

FOREIGN ENLISTMENT ACT.

33 and 34 Vict., Chap. 90.

AN Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace.

[9th August, 1870.]

Whereas it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title of Act.

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

Application of Act.

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

Commencement of Act.

3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

Illegal Enlistment.

Penalty on enlistment in service of foreign state.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engage-

ment in the military or naval service of any such foreign state as aforesaid,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on leaving Her Majesty's dominions with intent to serve a foreign state.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on embarking persons under false representations as to service.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on taking illegally enlisted persons on board ship.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,—

(1) Any person who, being a British subject within or without the dominions of Her Majesty, has, without

the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state:

(2) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,—

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour: and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Illegal Shipbuilding and Illegal Expeditions.

Penalty on illegal shipbuilding and illegal

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,—

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or expeditions.

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state:

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; that is to say,—

(1) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters

relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

Presumption as to evidence in case of illegal ship.

9. Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

Penalty on aiding the warlike equipment of foreign ships.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on fitting out naval or military expeditions without license.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting

out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punishment of accessories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Limitation of term of imprisonment.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Illegal Prize.

Illegal prize brought into British ports restored.

14. If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorised in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the

care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

General Provision.

License by Her Majesty how granted.

15. For the purposes of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

Legal Procedure.

Jurisdiction in respect of offences by persons against Act.

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Venue in respect of offences by persons.

24 & 25 Vict. c. 97.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Power to remove offenders for trial.

18. The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be

triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Jurisdiction in respect of forfeiture of ships for offences against Act.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations as to proceedings against the offender and against the ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officers authorised to seize offending ships.

21. The following officers, that is to say,

(1) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any

special or general instructions from the Board of Trade;

(2) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession;

(3) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

(4) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority"; but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

Powers of officers authorised to seize ships.

22. Any officer authorised to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

Special power of Secretary

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause

for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned. of State or chief executive authority to detain ship..

The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear

in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture, subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

Special power of local authority to detain ship.

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

Power of Secretary of State or executive authority to grant search warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign state at war with a friendly state, and to search such ship.

Exercise of powers of Secretary of State or chief executive authority.

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

(1) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:

(2) In Jersey by the Lieutenant Governor:

(3) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor:

(4) In the Isle of Man by the Lieutenant Governor:

(5) In any British possession by the Governor.

A copy of any warrant issued by a Secretary of State or by any officer authorised in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

Appeal from Court of Admiralty.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

Indemnity to officers.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Indemnity to Secretary of State or chief executive authority.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

Interpretation Clause.

Interpretation of terms.

30. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"Foreign state:"

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"Military service:"

"Military service" shall include military telegraphy and any other employment whatever, in or in connexion with any military operation:

"Naval service:"

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship

of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands: "United Kingdom:"

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act: "British possession:"

"The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State: "The Secretary of State:"

"The Governor" shall as respects India mean the Governor General or the governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "Governor": "Governor:"

"Court of Admiralty" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions: "Court of Admiralty:"

"Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water: "Ship:"

"Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly: "Building:"

"Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all "Equipping:"

words relating to equipping shall be construed accordingly:

"Ship and equipment:" "Ship and equipment" shall include a ship and everything in or belonging to a ship:

"Master." "Master" shall include any person having the charge or command of a ship.

Repeal of Acts, and Saving Clauses.

Repeal of Foreign Enlistment Act. 59 G. 3. c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled "An "Act to prevent the enlisting or engagement of His Majesty's "subjects to serve in foreign service, and the fitting out or "equipping, in His Majesty's dominions, vessels for warlike "purposes, without His Majesty's license," shall be repealed: Provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as to commissioned foreign ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.

Penalties not to extend to persons entering into military service in Asia. 59 G. 3. c. 69. s. 12.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.

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